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# FEDERAL DECISIONS.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO  
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-  
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-  
GENERAL, AND THE OPINIONS OF GENERAL  
IMPORTANCE OF THE TERRI-  
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;  
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri  
and Tennessee, a Digest of the Texas Reports, and  
local works on Pleading and Practice.*

VOL. XX.

IGNORANCE OF LAW — KENTUCKY.

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ATWOOD, DAVID

DAVID ATWOOD,  
PRINTER AND STEREOTYPED,  
MADISON, WIS.

# EXPLANATORY.

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1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.\* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

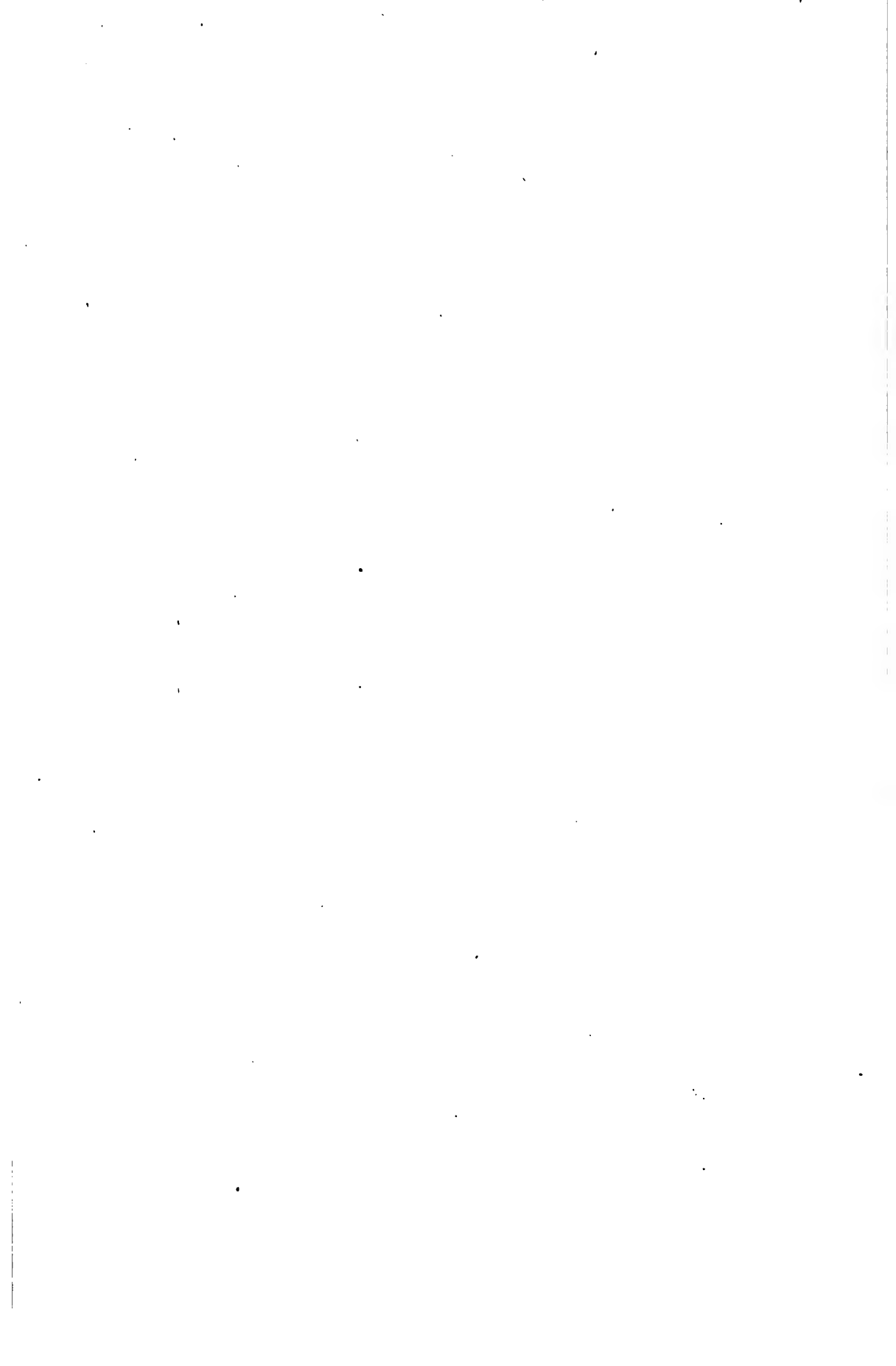




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Abbott's Admiralty .....	Abb. Adm.	Lowell .....	Low.
Abbott's U. S. ....	Abb.	McAllister.....	McAl.
Albany Law Journal .....	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary .....	McC.
Baldwin .....	Bald.	McLean .....	McL.
Bee .....	Bee.	MacArthur .....	MacArth.
Benedict .....	Ben.	Marshall .....	Marsh.
Bissell .....	Biss.	Martin.....	Martin (N. C.).
Black .....	Black.	Mason .....	Mason.
Blatchford.....	Blatch.	Montana Territory .....	Mont. T'y.
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Blatchford & Howland...	Bl. & How.	National Bankruptcy Regis-	
Bond .....	Bond.	ter .....	N. B. R.
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Call .....	Call (Va.).	Oregon .....	Oreg.
Central Law Journal.....	Cent. L. J.	Otto .....	Otto.
Chase's Decisions .....	Chase's Dec.	Overton .....	Overton (Tenn.).
Chicago Legal News .....	Ch. Leg. N.	Paine .....	Paine.
Clifford .....	Cliff.	Peters .....	Pet.
Colorado Territory.....	Colo. T'y.	Peters' Admiralty .....	Pet. Adm.
Connecticut Reports.....	Conn.	Peters' Circuit Court .....	Pet. C. C.
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Cranch .....	Cr.	Smith .....	Smith (N. H.).
Cranch's Circuit Court....	Cr. C. C.	Sprague .....	Spr.
Curtis .....	Curt.	Story .....	Story.
Dakota Territory.....	Dak. T'y.	Sumner.....	Sumn.
Dallas .....	Dal.	Taney .....	Taney.
Daveis.....	Dav.	Utah Territory .....	Utah T'y.
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Fisher's Patent Cases.....	Fish. Pat. Cas.	Ware .....	Ware.
Flippin .....	Flip.	Washington.....	Wash.
Gallison .....	Gall.	Washington Territory.....	Wash. T'y.
Gilpin .....	Gilp.	Wheaton .....	Wheat.
Hempstead .....	Hemp.	Wheeler's Criminal Cases ..	Wheeler.
Hoffman.....	Hoff.	Woods.....	Woods.
Holmes .....	Holmes.	Woodbury & Minot .....	Woodb. & M.
Howard .....	How.	Woolworth .....	Woolw.
Hughes .....	Hughes.	Wyoming Territory .....	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness .....	Van Ness.
Legal Gazette Reports .....	Leg. Gaz. R.		

# FEDERAL DECISIONS.

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## IGNORANCE OF LAW.

See CRIMES; MISTAKE.

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## ILLEGITIMATE CHILDREN.

See DOMESTIC RELATIONS.

---

## ILLINOIS LAND TITLES.

See LAND.

---

## IMBECILITY.

See INSANITY.

---

## IMMUNITIES AND PRIVILEGES.

See CONSTITUTION AND LAWS.

---

## IMPAIRING THE OBLIGATION OF CONTRACTS.

See CONSTITUTION AND LAWS, X.

---

## IMPEACHMENT OF WITNESSES.

See EVIDENCE, XXVII.

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## IMPORTS.

See CONSTITUTION AND LAWS, VIII, 7; REVENUE.

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## IMPOST AND EXCISE.

See CONSTITUTION AND LAWS; REVENUE.

## IMPRISONMENT FOR DEBT.

See DEBTOR AND CREDITOR.

## IMPROVEMENTS.

See LAND.

## INADEQUACY OF PRICE.

See FRAUD; SALES.

## INCUMBRANCES.

See CONVEYANCES; LAND.

## INDEMNITY.

See BONDS; CONTRACTS.

## INDIANS.

[See CRIMES; TREATIES. As to Indian Lands. see LAND.]

I. IN GENERAL, §§ 1-102.

II. JURISDICTION OVER INDIANS AND INDIAN  
COUNTRY, §§ 103-189.

III. REGULATION OF TRADE AND INTERCOURSE,  
§§ 190-238.

IV. TREATIES, §§ 239-244.

V. INDIAN AGENTS, §§ 245-250.

### I. IN GENERAL.

**SUMMARY** — *Right of discovery; policy in relation to the Indians*, §§ 1, 2.— *Indian territory*, §§ 3, 4.— *Powers of the states and of congress*, § 5.— *Right of self-government*, § 6.— *Not subject to taxation*, §§ 7-9.— *Rights under tribal relations*, § 10.— *Taxing Shawnees*, § 11.

§ 1. The right acquired by the various European nations by discoveries on this continent was the right to the soil as against other European nations, but not as against the Indians. It was the policy of Great Britain, and has been of the United States, to treat the Indian tribes as owners of and entitled to the soil, except so far as the same has been purchased of them by voluntary sale or acquired as a war indemnity from them. *Worcester v. Georgia*, §§ 12-52.

§ 2. It was the policy of Great Britain, and has been of the United States as her successor, to treat the various Indian tribes as capable of making treaties, of maintaining war and peace, and of governing themselves so far as their internal affairs were concerned, under the protection of the existing government. *Ibid.*

§ 3. The treaties and laws of the United States contemplate the territory set apart for the Indians as completely separated from that of the states, and provide that all intercourse with them shall be carried on exclusively by the general government and not by the states. *Ibid.*

§ 4. The acts of congress regulating trade and intercourse with the Indian tribes have treated the Indian nations as distinct political communities, having territorial boundaries within which their authority is exclusive, and as having a right within those boundaries, which is not only acknowledged, but guaranteed by the United States. *Ibid.*

§ 5. The United States, under the constitution, is vested with the sole and exclusive authority to regulate and control intercourse with the Indians, and the laws of no state can have

any force within the ascertained territory of an Indian nation, nor have the citizens of the state any right to enter such territory, except by consent of the Indians themselves, or in conformity with treaties and acts of congress. When exercised, the authority of the United States cannot be obstructed by a state. The acts, therefore, of the legislature of Georgia of 1829 and 1830, extending the laws of that state over the territory of the Cherokee Indians, and assuming to regulate and control the residence of whites therein, were void, being contrary to the constitution, laws and treaties of the United States. *Ibid.*

§ 6. An Indian nation is a state in the sense of having the right of self-government, and such right of self-government is not lost by its having agreed to trade with no other people or invoke the aid of any other sovereignty. It is not a foreign but a domestic state, existing within but not belonging to the Union. *Ibid.*

§ 7. Though the Indians of a state may resort to its courts, yet so long as they are considered and treated by the United States as maintaining their tribal relation, they cannot be taxed by the laws of the state. The Kansas Indians, §§ 53-58.

§ 8. A provision in an Indian treaty exempting their lands from "levy, sale and forfeiture," exempts them from levy and sale for taxes as well as by judicial process. *Ibid.*

§ 9. The lands of Indians still maintaining tribal relations are not taxable by the laws of the state in which they are situated, though such lands under treaties with the United States are held in severalty. *Ibid.*

§ 10. So long as the general government recognizes the tribal relations of Indians as continuing, the state within which such Indians may reside is bound to treat the tribal relation as continuing, and so long as that tribal character is recognized by the United States, they are under the protection of congress, and their property is withdrawn from the operation of state laws. *Ibid.*

§ 11. By the organic act and the act admitting Kansas into the Union it was prohibited from taxing the Shawnee Indians. *Ibid.*

[NOTES.— See §§ 59-102.]

#### WORCESTER v. THE STATE OF GEORGIA.

(6 Peters, 515-597. 1832.)

ERROR to the Superior Court for the County of Gwinnett, State of Georgia.  
Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This cause, in every point of view in which it can be placed, is of the deepest interest. The defendant is a state, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the state of Vermont, condemned to hard labor for four years in the penitentiary of Georgia under color of an act which he alleges to be repugnant to the constitution, laws and treaties of the United States. The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

§ 12. *When a record is properly before the supreme court.*

It behooves this court in every case, more especially in this, to examine into its jurisdiction with scrutinizing eyes before it proceeds to the exercise of a power which is controverted. The first step in the performance of this duty is the inquiry whether the record is properly before the court. It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned, and is also authenticated by the seal of the court. It is returned with and annexed to a writ of error issued in regular form, the citation being signed by one of the associate justices of the supreme court, and served on the governor and attorney-general of the state more than thirty days before the commencement of the term to which the writ of error was returnable.

The judicial act (1 Statutes at Large, 73, §§ 22, 25; 2 Laws U. S., 64, 65), so far

as it prescribes the mode of proceeding, appears to have been literally pursued. In February, 1797, a rule (6 Wheat., Rules) was made on this subject in the following words: "It is ordered by the court that the clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record and of all proceedings in the same, under his hand and the seal of the court." This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

In the case of *Martin v. Hunter's Lessee*, 1 Wheat., 304, 361 (APPEALS, §§ 682-729), an exception was taken to the return of the refusal of the state court to enter a prior judgment of reversal by this court, because it was not made by the judge of the state court to which the writ was directed; but the exception was overruled and the return was held sufficient. In *Buel v. Van Ness*, 8 Wheat., 312, also a writ of error to a state court, the record was authenticated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar that, in regard to this process, the law makes no distinction between a criminal and civil case. The same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given.

*McCulloch v. State of Maryland*, 4 Wheat., 316 (CONSTR., §§ 380-86), was a *qui tam* action, brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown v. State of Maryland*, 12 Wheat., 419 (CONSTR., §§ 1466-70), was an indictment for a fine and forfeiture. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways. The record, then, according to the judiciary act and the rule and the practice of the court, is regularly before us. The more important inquiry is, does it exhibit a case cognizable by this tribunal?

FURTHER STATEMENT OF FACTS.—The indictment charges the plaintiff in error, and others, being white persons, with the offense of "residing within the limits of the Cherokee nation without a license," and "without having taken the oath to support and defend the constitution and laws of the state of Georgia." The defendant in the state court appeared in proper person and filed the following plea:

"And the said Samuel A. Worcester, in his own proper person, comes and says that this court ought not to take further cognizance of the action and prosecution aforesaid, because, he says, that, on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee nation, and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee nation, out of the jurisdiction of this court, and not in the county of Gwinnett, or elsewhere within the jurisdiction of this court; and this defendant saith that he is a citizen of the state of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the president of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the gospel to the Cherokee Indians, and in translating the sacred Scriptures into their language, with the permission and approval of the said Cherokee nation, and in accordance with the humane policy of the government of the United States, for the civilization and improvement of the Indi-



ans; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment; and this defendant further saith that this prosecution the state of Georgia ought not to have or maintain, because, he saith, that several treaties have, from time to time, been entered into between the United States and the Cherokee nation of Indians, to wit, at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington city, on the 7th day of January, 1805; at Washington city, on the 22d day of March, 1816; at the Chickasaw council house, on the 14th day of September, 1816; at the Cherokee agency, on the 8th day of July, 1817; and at Washington city, on the 27th day of February, 1819 (7 Stats. at Large, 18-195); all which treaties have been duly ratified by the senate of the United States of America, and by which treaties the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their own territory; and by which treaties the whole of the territory now occupied by the Cherokee nation, on the east of the Mississippi, has been solemnly guarantied to them; all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several states composing the Union of the United States; and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a state, or from some one duly authorized thereto by the president of the United States; all of which will more fully and at large appear by reference to the aforesaid treaties. And this defendant saith that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognized as belonging to the said nation, and so, as aforesaid, held by them under the guaranty of the United States; that, for those acts, the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said state; and that the laws of the state of Georgia which profess to add the said territory to the several adjacent counties of the said state, and to extend the laws of Georgia over the said territory, and persons inhabiting the same, and, in particular, the act on which this indictment against this defendant was grounded, to wit, 'An act entitled an act to prevent the exercise of assumed and arbitrary power by all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory,' are repugnant to the aforesaid treaties, which, according to the constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void and of no effect; that the said laws of Georgia are also unconstitutional and void because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, as above recited; also, that the said laws of Georgia are unconstitutional and void because they

interfere with and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the — day of March, 1802 (2 Stats. at Large, 139), entitled ‘An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers;’ and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offense or offenses alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment.”

§ 13. *Where a plea is overruled, the court decides that the matter therein is no bar.*

This plea was overruled by the court. And the prisoner, being arraigned, pleaded not guilty. The jury found a verdict against him, and the court sentenced him to hard labor in the penitentiary for the term of four years. By overruling this plea, the court decided that the matter it contained was not a bar to the action. The plea, therefore, must be examined, for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the “act to establish the judicial courts of the United States.”

§ 14. *Case within the twenty-fifth section of the judiciary act.*

The plea avers that the residence, charged in the indictment, was under the authority of the president of the United States, and with the permission and approval of the Cherokee nation. That the treaties subsisting between the United States and the Cherokees acknowledge their right as a sovereign nation to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America. That the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void. That the said act is, also, unconstitutional, because it interferes with, and attempts to regulate and control, the intercourse with the Cherokee nation, which belongs exclusively to congress; and because, also, it is repugnant to the statute of the United States, entitled “An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.”

Let the averments of this plea be compared with the twenty-fifth section of the judicial act. That section enumerates the cases in which the final judgment or decree of a state court may be revised in the supreme court of the United States. These are, “where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission.”

The indictment and plea, in this case, draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians. If

not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege or exemption specially set up and claimed under them." They also draw in question the validity of a statute of the state of Georgia, "on the ground of its being repugnant to the constitution, treaties and laws of the United States, and the decision is in favor of its validity."

It is then, we think, too clear for controversy that the act of congress by which this court is constituted, has given it the power, and, of course, imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them. We must examine the defense set up in this plea. We must inquire and decide whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws and treaties of the United States.

It has been said at the bar that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence. If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded. It enacts that "all white persons residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof shall be punished by confinement to the penitentiary at hard labor for a term not less than four years."

The eleventh section authorizes the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee nation, to raise and organize a guard, etc. The thirteenth section enacts "that the said guard, or any member of them, shall be and they are hereby authorized and empowered to arrest any person legally charged with or detected in a violation of the laws of this state, and to convey, as soon as practicable, the person so arrested before a justice of the peace, judge of the superior or justice of inferior court of this state, to be dealt with according to law."

The extraterritorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction. The first step, then, in the inquiry, which the constitution and laws impose on this court, is an examination of the rightfulness of this claim.

§ 15. *Discovery gave title to the government by whose subjects or under whose authority it was made against all other European governments, which title might be consummated by possession.*

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original

claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing. Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific, or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights, over hunters and fishermen, on agriculturists and manufacturers? But power, war, conquest, give rights which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." 8 Wheat., 573.

§ 16. — *this did not affect the rights of the aborigines, but gave the exclusive right to purchase.*

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

§ 17. — *the United States succeeded to the claims of Great Britain, and the charters granted by Great Britain only conferred the title and gave the exclusive right to purchase of the natives.*

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed

merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies by whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.

§ 18. — *the power of making war contained in said charters meant defensive war.*

The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered "for their several defenses, to encounter, expulse, repel and resist all persons who shall, without license," attempt to inhabit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt at any time hereafter the least detriment or annoyance of the said several colonies or plantations."

The charter to Connecticut concludes a general power to make defensive war in these terms: "and upon just causes to invade and destroy the natives or other enemies of the said colony." The same power, in the same words, is conferred on the government of Rhode Island. This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only "on just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "And because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves, as of other enemies, pirates and robbers, may probably be feared, therefore we have given," etc. The instrument then confers the power of war. These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn, or occupying his lands during his pleasure. The same clause is introduced into the charter to Lord Baltimore.

The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It recites: "And whereas our provinces in North America have been frequently ravaged

by Indian enemies, more especially that of South Carolina, which, in the late war by the neighboring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred, and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages."

These motives for planting the new colony are incompatible with the lofty ideas of granting the soil, and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not for conquest. The charters contain passages showing one of their objects to be the civilization of the Indians, and their conversion to Christianity — objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the European continent as lies between the Mississippi and the Atlantic, explain their claims and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts rose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments, by asserting claims to their lands, or to dominion over their persons, the alliance was sought by flattering professions, and purchased by rich presents. The English, the French and the Spaniards were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects or the children of their father in Europe; lavish in professions of duty and affection; in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country, and this was probably the sense in which the term was understood by them.

§ 19. *The policy of Great Britain toward the Indians was to purchase the lands they were willing to sell; to treat them as nations capable of maintaining peace and war; of governing themselves under her protection; and she made treaties with them.*

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain with regard to the Indians were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mo-

bile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says: "Lastly, I inform you that it is the king's order to all his governors and subjects to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but, as you know that as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting-grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to or purchased by us (the king) as aforesaid, are reserved to the said Indians, or any of them. The proclamation proceeds: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

"And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described; or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements."

A proclamation, issued by Governor Gage in 1772, contains the following passage: "Whereas many persons, contrary to the positive orders of the king upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations; particularly on the *Ojibwa*." The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.

§ 20. *Treaty of peace and amity of the United States with the Indians, of 1778, considered.*

This was the settled state of things when the war of our Revolution commenced. The influence of our enemy was established; her resources enabled

her to keep up that influence, and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

The early journals of congress exhibit the most anxious desire to conciliate the Indian nations. Three Indian departments were established, and commissioners appointed in each, "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend, and everything which might excite hostility was avoided. The first treaty was made with the Delawares, in September, 1778 (7 Stats. at Large, 13). The language of equality in which it is drawn evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.

"1. That all offenses or acts of hostilities, by one or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.

"2. That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war, with any other nation or nations, that then each shall assist the other, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation," etc.

3. The third article stipulates, among other things, a free passage for the American troops through the Delaware nation, and engages that they shall be furnished with provisions and other necessaries at their value.

"For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties, and natural justice," etc.

5. The fifth article regulates the trade between the contracting parties, in a manner entirely equal.

6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States, by their enemies, and from the imputation of which congress was then peculiarly anxious to free the government. It is in these words: "Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the states aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion, the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their territorial rights, in



the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware nation shall abide by and hold fast to the chain of friendship now entered into."

The parties further agree that other tribes, friendly to the interest of the United States, may be invited to form a state, whereof the Delaware nation shall be the heads, and have a representation in congress. This treaty, in its language and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe. The sixth article shows how congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

§ 21. *Treaty of Hopewille with the Cherokees considered.*

During the war of the Revolution, the Cherokees took part with the British. After its termination, the United States, though desirous of peace, did not feel its necessity so strongly as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for congress which was before felt for the king of Great Britain. This may account for the language of the treaty of Hopewell. 7 Stats. at Large, 18. There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.

The treaty is introduced with the declaration that "the commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions." When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask further: Did the Cherokees come to the seat of the American government to solicit peace, or did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," then, has no real importance attached to it. The first and second articles stipulate for the mutual restoration of prisoners, and are, of course, equal.

§ 22. — *the clause therein placing the Cherokees under the protection of the United States merely binds them as dependent allies and involves no claim to their lands or dominion over their persons.*

The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power. This stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain, and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers, and its true meaning is discerned in their relative situation.

The general law of European sovereigns respecting their claims in America limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the dis-

orderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves — an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown as a dependently, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection without involving a surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise. The same stipulation entered into with the United States is undoubtedly to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government is explained by the language and acts of our first president.

§ 23. — *the term "allotted" in the treaty means "marked out."*

The fourth article draws the boundary between the Indians and the citizens of the United States. But in describing this boundary, the term "allotted" and the term "hunting-ground" are used. It is reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out." The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must, we think, be taken in the sense in which it was most obviously used.

§ 24. — *the term "hunting-grounds" therein does not restrict the use of the lands to that purpose.*

So with respect to the words "hunting-grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved. To the United States it could be a matter of no concern whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional cornfield, interrupted and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government. The fifth article withdraws the protection of the United States from any citizen who has settled or shall settle on the lands allotted to the Indians for their hunting-grounds; and stipulates that, if he shall not remove within six months, the Indians may punish him. The sixth and seventh articles stipulate for the punishment of the citizens of either country who may commit offenses on or against the citizens of the other. The only inference to

be drawn from them is, that the United States considered the Cherokees as a nation.

§ 25. — *the ninth article of said treaty does not deprive the Cherokees of self-government.*

The ninth article is in these words: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper."

To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made; or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

§ 26. — *said treaty treats the Cherokees as a nation, capable of maintaining peace or war, and ascertains the boundaries between them and the United States.*

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them: but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

§ 26a. *Treaty of Holston, of 1791, considered.*

The treaty of Hopewell seems not to have established a solid peace. To accommodate the differences still existing between the state of Georgia and the Cherokee nation, the treaty of Holston was negotiated in July, 1791. 7 Stats. at Large, 39. The existing constitution of the United States had been then adopted, and the government having more intrinsic capacity to enforce its just claims, was, perhaps, less mindful of high-sounding expressions denoting superiority. We hear no more of giving peace to the Cherokees. The

mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed; and, in pursuance of this desire, the first article declares that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee nation.

§ 27. — *the second article, placing the Cherokees under the protection of the United States, construed.*

The second article repeats the important acknowledgment that the Cherokee nation is under the protection of the United States of America, and of no other sovereign whatsoever. The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.

This relation was that of a nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master. The third article contains a perfectly equal stipulation for the surrender of prisoners.

§ 28. — *the fourth article, fixing the boundary, acknowledges the national character of the Cherokees.*

The fourth article declares that "the boundary between the United States and the Cherokee nation shall be as follows: beginning," etc. We hear no more of "allotments," or of "hunting-grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each, the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed that it shall be plainly marked by commissioners, to be appointed by each party; and in order to extinguish forever all claim of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration, the Cherokees release all right to the ceded land forever.

By the fifth article the Cherokees allow the United States a road through their country, and the navigation of the Tennessee river. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them. By the sixth article it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it.

By the seventh article the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded. The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport. The remaining articles are equal and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

§ 29. — *this treaty explicitly recognizes the national character of the Cherokees, and their right of self-government.*

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self-government, thus guarantying their lands, assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force. To the general pledge of protection have been added several specific pledges deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

§ 30. *The acts of congress regulating trade and intercourse with the Indians treat them as nations, and respect the treaties made with them.*

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guarantied by the United States.

In 1819 congress passed an act (3 Stats. at Large, 516) for promoting those humane designs of civilizing the neighboring Indians, which had long been cherished by the executive. It enacts "that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the president of the United States shall be and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic; and for performing such other duties as may be enjoined, according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties."

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it cannot be doubted that the general words of the act comprehend them. Their advance in the "habits and arts of civilization" rather encouraged perseverance in the laudable exertions still further to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

§ 31. *The treaties and laws of the United States provide that all intercourse with Indians be carried on exclusively by the United States, and regard their territory as completely separated from the states.*

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Is this the rightful exercise of power, or is it usurpation?

§ 32. *While the states were colonies the power of making treaties with and laws concerning the Indians, and making war and peace with them, resided in the crown.*

While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced congress was composed of an assemblage of deputies acting under specific powers, granted by the legislatures or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all; congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connection with the mother country, and declared these united colonies to be independent states. Without any written definition of powers they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity and on the same principles, congress assumed the management of Indian affairs; first in the name of these united colonies, and afterwards in the name of the United States. Early attempts were made at negotiation and to regulate trade with them. These not proving successful, war was carried on under the direction and with the forces of the United States; and the efforts to make peace by treaty were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the states respectively, unless a state be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted." This instrument also gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the states; provided that the legislative power of any state within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the states of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims produced representations to congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two states, but recommends an accommodation, by liberal cessions of territory, or by an admission on their part of the powers claimed by congress.

§ 33. — *under the constitution of the United States those powers belong to the general government.*

The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations and among the several states, and with the Indian tribes.

These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power in the confederation are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.

§ 34. — *Georgia, by her former laws, recognized these principles in regard to the Indians.*

Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any state within whose chartered limits they might reside by a boundary line, established by treaties; that within their boundary they possessed rights with which no state could interfere; and that the whole power of regulating the intercourse with them was vested in the United States. A review of these acts, on the part of Georgia, would occupy too much time, and is the less necessary, because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed, is placed the charters granted by the monarch of a distant and distinct region, parceling out a territory in possession of others whom he could not remove, and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them first the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the

settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government — by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its rights of self-government under the guaranty and protection of one or more allies.

§ 35. *The Cherokee nation being a distinct community occupying its own defined territory, in which the laws of Georgia have no force, and the whole intercourse with it being vested in the government of the United States, the acts of Georgia of 1830 and of 1832 are void, and judgments under them are nullities.*

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia under which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity. Can this court revise and reverse it?

§ 36. — *and this court has power to revise and reverse a judgment of the state court on a criminal prosecution under said acts.*

If the objection to the system of legislation lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the view which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the legislation of which, according to the settled principles of our constitution, is committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guaranty to them all the land within their boundary, solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognize the pre-existing power of the nation to govern itself. They are in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties. The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the president of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under



the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by congress had recommended. He was apprehended, tried and condemned under color of a law which has been shown to be repugnant to the constitution, laws and treaties of the United States. Had a judgment liable to the same objections been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws and treaties of his country.

This point has been elaborately argued, and, after deliberate consideration, decided in the case of *Cohens v. Commonwealth of Virginia*, 6 Wheat., 264 (COURTS, §§ 734-45).

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the state of Georgia for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties and laws of the United States, and ought, therefore, to be reversed and annulled.

Opinion by MR. JUSTICE McLEAN.

Having shown that a writ of error will lie in this case, and that the record has been duly certified, the next inquiry that arises is, what are the acts of the United States which relate to the Cherokee Indians and the acts of Georgia; and were these acts of the United States sanctioned by the federal constitution?

§ 37. *Constitutional powers of congress with respect to the Indians considered and construed.*

Among the enumerated powers of congress contained in the eighth section of the first article of the constitution, it is declared "that congress shall have power to regulate commerce with foreign nations and among the Indian tribes." By the articles of confederation, which were adopted on the 9th day of July 1778, it was provided "that the United States, in congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; regulating the trade and management of all affairs with the Indians, not members of any of the states: Provided, that the legislative right of any state, within its own limits, be not infringed or violated."

As early as June, 1775, and before the adoption of the articles of confederation, congress took into their consideration the subject of Indian affairs. The Indian country was divided into three departments, and the superintendence of each was committed to commissioners, who were authorized to hold treaties with the Indians, make disbursements of money for their use, and to discharge various duties designed to preserve peace and cultivate a friendly feeling with them towards the colonies. No person was permitted to trade with them without a license from one or more of the commissioners of the respective departments.

In April, 1776, it was "resolved that the commissioners of Indian affairs in

the middle department, or any one of them, be desired to employ, for reasonable salaries, a minister of the gospel to reside among the Delaware Indians, and instruct them in the Christian religion; a schoolmaster, to teach the youth reading, writing and arithmetic; also, a blacksmith to do the work of the Indians." The general intercourse with the Indians continued to be managed under the superintendence of the continental congress.

§ 38. *Treaty of Hopewell, of 1785, with the Indians, considered and construed.*

On the 28th of November, 1785, the treaty of Hopewell was formed, which was the first treaty made with the Cherokee Indians. The commissioners of the United States were required to give notice to the executives of Virginia, North Carolina, South Carolina and Georgia, in order that each might appoint one or more persons to attend the treaty, but they seem to have had no power to act on the occasion. In this treaty it is stipulated that "the commissioners plenipotentiary of the United States, in congress assembled, give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions."

1. The Cherokees to restore all prisoners and property taken during the war.
2. The United States to restore to the Cherokees all prisoners.
3. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other sovereign whatsoever.
4. The boundary line between the Cherokees and the citizens of the United States was agreed to as designated.
5. If any person, not being an Indian, intrude upon the land "allotted" to the Indians, or, being settled on it, shall refuse to remove within six months after the ratification of the treaty, he forfeits the protection of the United States, and the Indians were at liberty to punish him as they might think proper.
6. The Indians are bound to deliver up to the United States any Indian who shall commit robbery or other capital crime on a white person living within their protection.
7. If the same offense be committed on an Indian by a citizen of the United States, he is to be punished.
8. It is understood that the punishment of the innocent, under the idea of retaliation, is unjust, and shall not be practiced on either side, except where there is a manifest violation of this treaty, and then it shall be preceded first by a demand of justice, and if refused, then by a declaration of hostilities.

"That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have a right to send a deputy of their choice, whenever they think fit, to congress."

The treaty of Holston was entered into with the same people on the 2d day of July, 1791. This was a treaty of peace, in which the Cherokees again placed themselves under the protection of the United States, and engaged to hold no treaty with any foreign power, individual, state, or with individuals of any state. Prisoners were agreed to be delivered up on both sides, a new Indian boundary was fixed, and a cession of land made to the United States on the payment of a stipulated consideration.

A free, unmolested road was agreed to be given through the Indian lands, and the free navigation of the Tennessee river. It was agreed that the United States should have the exclusive right of regulating their trade, and a solemn

guaranty of their land, not ceded, was made. A similar provision was made as to the punishment of offenders, and as to all persons who might enter the Indian territory, as was contained in the treaty of Hopewell. Also, that reprisal or retaliation shall not be committed until satisfaction shall have been demanded of the aggressor.

*§ 39. Other Indian treaties considered and construed.*

On the 7th day of August, 1786, an ordinance for the regulation of Indian affairs was adopted which repealed the former system. In 1794 another treaty (7 Stats. at Large, 43) was made with the Cherokees, the object of which was to carry into effect the treaty of Holston. And on the plains of Tellico, on the 2d of October, 1798, the Cherokees, in another treaty (id., 62) agreed to give a right of way, in a certain direction, over their lands. Other engagements were also entered into which need not be referred to. Various other treaties were made by the United States with the Cherokee Indians, by which, among other arrangements, cessions of territory were procured and boundaries agreed on.

In a treaty of 1817 (id., 156) a distinct wish is expressed by the Cherokees to assume a more regular form of government, in which they are encouraged by the United States. By a treaty held at Washington, on the 27th day of February, 1819, a reservation of land is made by the Cherokees for a school fund; which was to be surveyed and sold by the United States for that purpose. And it was agreed that all white persons who had intruded on the Indian lands should be removed. To give effect to various treaties with this people, the power of the executive has frequently been exercised; and at one time General Washington expressed a firm determination to resort to military force to remove intruders from the Indian territories.

*§ 40. Acts of congress in respect to the Indians considered and construed.*

On the 30th of March, 1802, congress passed an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. In this act it is provided that any citizen or resident in the United States who shall enter into the Indian lands to hunt, or for any other purpose, without a license, shall be subject to a fine and imprisonment. And if any person shall attempt to survey, or actually survey, the Indian lands, he shall be liable to forfeit a sum not exceeding \$1,000, and be imprisoned not exceeding twelve months. No person is permitted to reside as a trader within the Indian boundaries without a license or permit. All persons are prohibited, under a heavy penalty, from purchasing the Indian lands, and all such purchases are declared to be void. And it is made lawful for the military force of the United States to arrest offenders against the provisions of the act.

By the nineteenth section it is provided that the act shall not be so construed as to "prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states, or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair said road." Nor was the act to be so construed as to prevent persons from traveling from Knoxville to Price's settlement, provided they shall travel in the tract or path which is usually traveled, and the Indians do not object; but if they object, then all travel on this road to be prohibited, after proclamation by the president, under the penalties provided in the act.

Several acts, having the same object in view, were passed prior to this one;

but as they were repealed either before or by the act of 1802, their provisions need not be specially noticed. The acts of the state of Georgia, which the plaintiff in error complains of as being repugnant to the constitution, treaties and laws of the United States, are found in two statutes.

§ 41. *Acts of Georgia of 1829 and 1830, in regard to the Cherokee Indians, considered and construed.*

The first act was passed the 12th of December, 1829, and is entitled "An act to add the territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, Dekalb, Gwinnett and Habersham, and to extend the laws of the state over the same, and to annul all laws made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal process in said territory, and to regulate the testimony of Indians, and to repeal the ninth section of the act of 1828 on this subject."

This act annexes the territory of the Indians, within the limits of Georgia, to the counties named in the title, and extends the jurisdiction of the state over it. It annuls the laws, ordinances, orders and regulations, of any kind, made by the Cherokees, either in council or in any other way, and they are not permitted to be given in evidence in the courts of the state. By this law, no Indian, or the descendant of an Indian, residing within the Creek or Cherokee nation of Indians, shall be deemed a competent witness in any court of the state, to which a white person may be a party, except such white person reside within the nation. Offenses under the act are to be punished by confinement in the penitentiary, in some cases not less than four nor more than six years, and in others not exceeding four years.

The second act was passed on the 22d day of December, 1830, and is entitled "An act to prevent the exercise of assumed and arbitrary power, by all persons, on pretext of authority from the Cherokee Indians and their laws; and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians; and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory."

By the first section of this act it is made a penitentiary offense, after the 1st day of February, 1831, for any person or persons, under color or pretense of authority from the said Cherokee tribe, or as headmen, chiefs, or warriors of said tribe, to cause or procure, by any means, the assembling of any council or other pretended legislative body of the said Indians, for the purpose of legislating, etc.

They are prohibited from making laws, holding courts of justice, or executing process. And all white persons, after the 1st of March, 1831, who shall reside within the limits of the Cherokee nation, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, or who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and upon conviction thereof shall be punished by confinement to the penitentiary at hard labor for a term not less than four years. From this punishment agents of the United States are excepted, white females, and male children under twenty-one years of age.

Persons who have obtained license are required to take the following oath: "I, A. B., do solemnly swear that I will support and defend the constitution and laws of the state of Georgia, and uprightly demean myself as a citizen

thereof. So help me God." The governor is authorized to organize a guard, which shall not consist of more than sixty persons, to protect the mines in the Indian territory, and the guard is authorized to arrest all offenders under the act.

§ 42. — *said acts of the Georgia legislature are repugnant to the said treaties of the United States with the Cherokees, and to the act of congress of 1802, in respect to said Cherokees.*

It is apparent that these laws are repugnant to the treaties with the Cherokee Indians which have been referred to, and to the law of 1802. This repugnance is made so clear by an exhibition of the respective acts that no force of demonstration can make it more palpable.

By the treaties and laws of the United States, rights are guarantied to the Cherokees, both as it respects their territory and internal polity. By the laws of Georgia these rights are abolished, and not only abolished, but an ignominious punishment is inflicted on the Indians and others for the exercise of them. The important question then arises, which shall stand — the laws of the United States or the laws of Georgia? No rule of construction, or subtlety of argument, can evade an answer to this question. The response must be, so far as the punishment of the plaintiff in error is concerned, in favor of the one or the other.

Not to feel the full weight of this momentous subject would evidence an ignorance of that high responsibility which is devolved upon this tribunal, and upon its humblest member, in giving a decision in this case. Are the treaties and law which have been cited in force? and what, if any, obligations do they impose on the federal government within the limits of Georgia?

§ 43. *Relations of the European settlers with Indians considered.*

A reference has been made to the policy of the United States on the subject of Indian affairs, before the adoption of the constitution, with the view of ascertaining in what light the Indians have been considered by the first official acts in relation to them, by the United States. For this object it might not be improper to notice how they were considered by the European inhabitants, who first formed settlements in this part of the continent of America.

The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted. And it is equally clear, that the range of nations or tribes, who exist in the hunter state, may be restricted within reasonable limits. They shall not be permitted to roam, in the pursuit of game, over an extensive and rich country, whilst in other parts human beings are crowded so closely together as to render the means of subsistence precarious. The law of nature, which is paramount to all other laws, gives the right to every nation, to the enjoyment of a reasonable extent of country, so as to derive the means of subsistence from the soil.

In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration.

This policy has obtained from the earliest white settlements in this country

down to the present time. Some cessions of territory may have been made by the Indians, in compliance with the terms on which peace was offered by the whites; but the soil thus taken was taken by the laws of conquest, and always as an indemnity for the expenses of the war commenced by the Indians.

§ 44. *Although the sovereignty of the country was not recognized in the Indians, the right to present possession and self-government was.*

At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession. In some of the old states, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who by their reduced numbers had lost the power of self-government, the laws of the state have been extended over them for the protection of their persons and property.

Before the adoption of the constitution, the mode of treating with the Indians was various. After the formation of the confederacy, this subject was placed under the special superintendence of the united colonies, though subsequent to that time treaties may have been occasionally entered into between a state and the Indians in its neighborhood. It is not considered to be at all important to go into a minute inquiry on this subject.

§ 45. *The power to regulate commerce with the Indians vests exclusively in congress.*

By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress, as the power to regulate commerce with foreign nations, to coin money, to establish postoffices, and to declare war. It is enumerated in the same section, and belongs to the same class of powers. This investiture of power has been exercised in the regulation of commerce with the Indians, sometimes by treaty, and at other times by enactments of congress. In this respect they have been placed by the federal authority, with but few exceptions, on the same footing as foreign nations.

§ 46. *The requisites to a treaty are that each shall possess the right of self-government and capacity to carry out the treaty.*

It is said that these treaties are nothing more than compacts, which cannot be considered as obligatory on the United States, from a want of power in the Indians to enter into them. What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government. Is it essential that each party shall possess the same attributes of sovereignty, to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.

Under the constitution, no state can enter into any treaty; and it is believed that, since its adoption, no state, under its own authority, has held a treaty with the Indians.

§ 47. *Relations of the United States with the Indians defined.*

It must be admitted that the Indians sustain a peculiar relation to the

United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the supreme court of the United States; and yet, having the right of self-government, they, in some sense, form a state. In the management of their internal concerns they are dependent on no power. They punish offenses under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war and form treaties of peace. The exercise of these and other powers gives to them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil.

§ 48. *Neither their right of self-government nor capacity to make treaties is destroyed by any treaties of the Cherokees with the United States.*

By various treaties the Cherokees have placed themselves under the protection of the United States; they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts. Every state is more or less dependent on those which surround it; but, unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. They may exercise the powers not relinquished, and bind themselves as a distinct and separate community.

§ 49. *Rules of construction of Indian treaties.*

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word "allotted," in reference to the land guarantied to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

The question may be asked, is no distinction to be made between a civilized and savage people? Are our Indians to be placed upon a footing with the nations of Europe with whom we have made treaties? The inquiry is not, what station shall now be given to the Indian tribes in our country? but, what relation have they sustained to us since the commencement of our government?

§ 50. *Treaties made with the Indians are binding upon the United States.*

We have made treaties with them; and are those treaties to be disregarded on our part, because they were entered into with an uncivilized people? Does this lessen the obligation of such treaties? By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations upon us? The president and senate, except under the treaty-making power, cannot enter into compacts with the Indians or with foreign nations. This power has been uniformly exercised in forming treaties with the Indians. Nations differ from each other in condition, and that of the same nation may change by the revolutions of time, but the principles of justice are the same. They rest upon a base which will remain beyond the endurance of time.

After a lapse of more than forty years since treaties with the Indians have

been solemnly ratified by the general government, it is too late to deny their binding force. Have the numerous treaties which have been formed with them, and the ratifications by the president and senate, been nothing more than an idle pageantry? By numerous treaties with the Indian tribes we have acquired accessions of territory, of incalculable value to the Union. Except by compact we have not even claimed a right of way through the Indian lands. We have recognized in them the right to make war. No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors. In the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community — not a foreign, but a domestic community — not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation.

§ 51. — *such treaties, as well as said act of congress of 1802, are in force within the limits of Georgia.*

But can the treaties which have been referred to and the law of 1802 be considered in force within the limits of the state of Georgia? In the act of cession made by Georgia to the United States in 1802, of all lands claimed by her west of the line designated, one of the conditions was, “that the United States should, at their own expense, extinguish, for the use of Georgia, as early as the same can be peaceably obtained, on reasonable terms, the Indian title to lands within the state of Georgia.”

One of the counsel, in the argument, endeavored to show that no part of the country now inhabited by the Cherokee Indians is within what is called the chartered limits of Georgia.

It appears that the charter of Georgia was surrendered by the trustees, and that, like the state of South Carolina, she became a regal colony. The effect of this change was to authorize the crown to alter the boundaries, in the exercise of its discretion. Certain alterations, it seems, were subsequently made; but I do not conceive it can be of any importance to enter into a minute consideration of them. Under its charter it may be observed that Georgia derived a right to the soil, subject to the Indian title, by occupancy. By the act of cession, Georgia designated a certain line as the limit of that cession, and this line, unless subsequently altered, with the assent of the parties interested, must be considered as the boundary of the state of Georgia. This line, having been thus recognized, cannot be contested on any question which may incidentally arise for judicial decision.

It is important, on this part of the case, to ascertain in what light Georgia has considered the Indian title to lands generally, and particularly within her own boundaries; and also as to the right of the Indians to self-government. In the first place, she was a party to all the treaties entered into between the United States and the Indians, since the adoption of the constitution. And prior to that period she was represented in making them, and was bound by their provisions, although it is alleged that she remonstrated against the treaty of Hopewell. In the passage of the intercourse law of 1802, as one of the constituent parts of the Union, she was also a party. The stipulation made in her act of cession, that the United States should extinguish the Indian title



to lands within the state, was a distinct recognition of the right of the federal government to make the extinguishment; and also that, until it should be made, the right of occupancy would remain in the Indians.

In a law of the state of Georgia, "for opening the land office and for other purposes," passed in 1783, it is declared that surveys made on Indian lands were null and void; a fine was inflicted on the person making the survey, which, if not paid by the offender, he was punished by imprisonment. By a subsequent act, a line was fixed for the Indians, which was a boundary between them and the whites. A similar provision is found in other laws of Georgia, passed before the adoption of the constitution. By an act of 1787, severe corporeal punishment was inflicted on those who made or attempted to make surveys "beyond the temporary line designating the Indian hunting-ground."

On the 19th of November, 1814, the following resolutions were adopted by the Georgia legislature:

"Whereas, many of the citizens of this state, without regard to existing treaties between the friendly Indians and the United States, and contrary to the interest and good policy of this state, have gone and are frequently going over and settling and cultivating the lands allotted to the friendly Indians for their hunting-ground, by which means the state is not only deprived of their services in the army, but considerable feuds are engendered between us and our friendly neighboring Indians:

"Resolved, therefore, by the senate and house of representatives of the state of Georgia in general assembly met, that his excellency the governor be and is hereby requested to take the necessary means to have all intruders removed off the Indian lands, and that proper steps be taken to prevent future aggressions."

In 1817 the legislature refused to take any steps to dispose of lands acquired by treaty with the Indians, until the treaty had been ratified by the senate, and, by a resolution, the governor was directed to have the line run between the state of Georgia and the Indians, according to the late treaty. The same thing was again done in the year 1819, under a recent treaty.

In a memorial to the president of the United States by the legislature of Georgia, in 1819, they say, "it has long been the desire of Georgia that her settlements should be extended to her ultimate limits." "That the soil within her boundaries should be subjected to her control, and that her police organization and government should be fixed and permanent." "That the state of Georgia claims a right to the jurisdiction and soil of the territory within her limits." "She admits, however, that the right is inchoate, remaining to be perfected by the United States, in the extinction of the Indian title; the United States *pro hac vice* as their agents."

The Indian title was also distinctly acknowledged by the act of 1796, repealing the Yazoo act. It is there declared, in reference to certain lands, that "they are the sole property of the state, subject only to the right of the treaty of the United States, to enable the state to purchase, under its pre-emption right, the Indian title to the same;" and also that the land is vested in the "state, to whom the right of pre-emption to the same belongs, subject only to the controlling power of the United States, to authorize any treaties for, and to superintend the same." This language, it will be observed, was used long before the act of cession.

On the 25th of March, 1825, the governor of Georgia issued the following proclamation:

"Whereas it is provided in said treaty that the United States shall protect the Indians against the encroachments, hostilities and impositions of the whites, so that they suffer no imposition, molestation or injury in their persons, goods, effects, their dwellings or the lands they occupy, until their removal shall have been accomplished, according to the terms of the treaty" which had been recently made with the Indians:

"I have therefore thought proper to issue this my proclamation warning all persons, citizens of Georgia or others, against trespassing or intruding upon lands occupied by the Indians, within the limits of Georgia, either for the purpose of settlement or otherwise, as every such act will be in direct violation of the provisions of the treaty aforesaid, and will expose the aggressors to the most certain and summary punishment, by the authorities of the state and the United States." "All good citizens, therefore, pursuing the dictates of good faith, will unite in enforcing the obligations of the treaty, as the supreme law," etc.

Many other references might be made to the public acts of the state of Georgia, to show that she admitted the obligation of Indian treaties, but the above are believed to be sufficient. These acts do honor to the character of that highly respectable state. Under the act of cession, the United States were bound, in good faith, to extinguish the Indian title to lands within the limits of Georgia, so soon as it could be done peaceably and on reasonable terms.

The state of Georgia has repeatedly remonstrated to the president on this subject, and called upon the government to take the necessary steps to fulfil its engagement. She complained that whilst the Indian title to immense tracts of country had been extinguished elsewhere, within the limits of Georgia, but little progress had been made; and this was attributed, either to a want of effort on the part of the federal government, or to the effect of its policy towards the Indians. In one or more of the treaties titles in fee-simple were given to the Indians, to certain reservations of land; and this was complained of, by Georgia, as a direct infraction of the condition of the cession. It has also been asserted that the policy of the government, in advancing the cause of civilization among the Cherokees, and inducing them to assume the forms of a regular government and of civilized life, was calculated to increase their attachment to the soil they inhabit and to render the purchase of their title more difficult, if not impracticable.

A full investigation of this subject may not be considered as strictly within the scope of the judicial inquiry which belongs to the present case. But, to some extent, it has a direct bearing on the question before the court, as it tends to show how the rights and powers of Georgia were construed by her public functionaries.

By the first president of the United States, and by every succeeding one, a strong solicitude has been expressed for the civilization of the Indians. Through the agency of the government, they have been partially induced, in some parts of the Union, to change the hunter state for that of the agriculturist and herdsman.

In a letter addressed by Mr. Jefferson to the Cherokees, dated the 9th of January, 1809, he recommends them to adopt a regular government, that

crimes might be punished and property protected. He points out the mode by which a council should be chosen, who should have power to enact laws; and he also recommended the appointment of judicial and executive agents, through whom the law might be enforced. The agent of the government, who resided among them, was recommended to be associated with their council, that he might give the necessary advice on all subjects relating to their government.

In the treaty of 1817 the Cherokees are encouraged to adopt a regular form of government. Since that time a law has been passed making an annual appropriation of the sum of \$10,000, as a school fund, for the education of Indian youths, which has been distributed among the different tribes where schools had been established. Missionary labors among the Indians have also been sanctioned by the government, by granting permits to those who were disposed to engage in such a work, to reside in the Indian country.

That the means adopted by the general government to reclaim the savage from his erratic life, and induce him to assume the forms of civilization, have had a tendency to increase the attachment of the Cherokees to the country they now inhabit, is extremely probable; and that it increased the difficulty of purchasing their lands, as by act of cession the general government agreed to do, is equally probable.

Neither Georgia nor the United States, when the cession was made, contemplated that force should be used in the extinguishment of the Indian title; nor that it should be procured on terms that are not reasonable. But, may it not be said, with equal truth, that it was not contemplated by either party that any obstructions to the fulfillment of the compact should be allowed, much less sanctioned by the United States?

The humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling; and if the efforts made have not proved as successful as was anticipated, still, much has been done. Whether the advantages of this policy should not have been held out by the government to the Cherokees within the limits of Georgia, as an inducement for them to change their residence and fix it elsewhere, rather than by such means to increase their attachment to their present home, as has been insisted on, is a question which may be considered by another branch of the government. Such a course might, perhaps, have secured to the Cherokee Indians all the advantages they have realized from the paternal superintendence of the government, and have enabled it, on peaceable and reasonable terms, to comply with the act of cession.

Does the intercourse law of 1802 apply to the Indians who live within the limits of Georgia? The nineteenth section of that act provides "that it shall not be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." This provision, it has been supposed, excepts from the operation of the law the Indian lands which lie within any state. A moment's reflection will show that this construction is most clearly erroneous.

To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and within the ordinary jurisdiction of a state; not only within the limits of a state, but within the common exercise of its jurisdiction.

No one will pretend that this was the situation of the Cherokees who lived within the state of Georgia, in 1802; or, indeed, that such is their present situation. If, then, they are not embraced by the exception, all the provisions of the act of 1802 apply to them. In the very section which contains the exception it is provided that the use of the road from Washington district to Mero district should be enjoyed, and that the citizens of Tennessee, under the orders of the governor, might keep the road in repair. And, in the same section, the navigation of the Tennessee river is reserved, and a right to travel from Knoxville to Price's settlement, provided the Indians should not object.

Now all these provisions relate to the Cherokee country; and, can it be supposed, by any one, that such provisions would have been made in the act, if congress had not considered it as applying to the Cherokee country, whether in the state of Georgia or in the state of Tennessee? The exception applied exclusively to those fragments of tribes which are found in several of the states, and which came literally within the description used.

Much has been said against the existence of an independent power within a sovereign state; and the conclusion has been drawn that the Indians, as a matter of right, cannot enforce their own laws within the territorial limits of a state. The refutation of this argument is found in our past history. That fragments of tribes, having lost the power of self-government, and who lived within the ordinary jurisdiction of a state, have been taken under the protection of the laws, has already been admitted. But there has been no instance where the state laws have been generally extended over a numerous tribe of Indians, living within the state, and exercising the right of self-government, until recently.

Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that state, more for her protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But even the state of New York has never asserted the power, it is believed, to regulate their concerns beyond the suppression of crime. Might not the same objection to this interior independent power by Georgia have been urged, with as much force as at present, ever since the adoption of the constitution? Her chartered limits, to the extent claimed, embraced a great number of different nations of Indians, all of whom were governed by their own laws, and were amenable only to them. Has not this been the condition of the Indians within Tennessee, Ohio, and other states?

The exercise of this independent power surely does not become more objectionable as it assumes the basis of justice and the forms of civilization. Would it not be a singular argument to admit that, so long as the Indians govern by the rifle and the tomahawk, their government may be tolerated; but that it must be suppressed as soon as it shall be administered upon the enlightened principles of reason and justice? Are not those nations of Indians who have made some advances in civilization, better neighbors than those who are still in a savage state? And is not the principle as to their self-government, within the jurisdiction of a state, the same?

When Georgia sanctioned the constitution, and conferred on the national legislature the exclusive right to regulate commerce, or intercourse with the Indians, did she reserve the right to regulate intercourse with the Indians

within her limits? This will not be pretended. If such had been the construction of her own powers, would they not have been exercised? Did her senators object to the numerous treaties which have been formed with the different tribes, who lived within her acknowledged boundaries? Why did she apply to the executive of the Union repeatedly, to have the Indian title extinguished; to establish a line between the Indians and the state; and to procure a right of way through the Indian lands?

The residence of Indians, governed by their own laws, within the limits of a state, has never been deemed incompatible with state sovereignty, until recently. And yet, this has been the condition of many distinct tribes of Indians since the foundation of the federal government. How is the question varied by the residence of the Indians in a territory of the United States? Are not the United States sovereign within their territories? And has it ever been conceived by any one that the Indian governments, which exist in the territories, are incompatible with the sovereignty of the Union?

A state claims the right of sovereignty, commensurate with her territory; as the United States claim it, in their proper sphere, to the extent of the federal limits. This right or power, in some cases, may be exercised, but not in others. Should a hostile force invade the country, at its most remote boundary, it would become the duty of the general government to expel the invaders. But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.

Is it incompatible with state sovereignty to grant exclusive jurisdiction to the federal government over a number of acres of land, for military purposes? Our forts and arsenals, though situated in the different states, are not within their jurisdiction. Does not the constitution give to the United States as exclusive jurisdiction in regulating intercourse with the Indians as has been given to them over any other subjects? Is there any doubt as to this investiture of power? Has it not been exercised by the federal government, ever since its formation, not only without objection, but under the express sanction of all the states?

The power to dispose of the public domain is an attribute of sovereignty. Can the new states dispose of the lands within their limits, which are owned by the federal government? The power to tax is also an attribute of sovereignty; but can the new states tax the lands of the United States? Have they not bound themselves, by compact, not to tax the public lands, nor until five years after they shall have been sold? May they violate this compact at discretion?

Why may not these powers be exercised by the respective states? The answer is, because they have parted with them expressly for the general good. Why may not a state coin money, issue bills of credit, enter into a treaty of alliance or confederation, or regulate commerce with foreign nations? Because these powers have been expressly and exclusively given to the federal government.

Has not the power been as expressly conferred on the federal government to regulate intercourse with the Indians; and is it not as exclusively given as any of the powers above enumerated? There being no exception to the exercise of this power, it must operate on all communities of Indians exercising the right of self-government; and, consequently, include those who reside within the limits of a state, as well as others. Such has been the uniform construc-

tion of this power by the federal government, and of every state government, until the question was raised by the state of Georgia.

Under this clause of the constitution no political jurisdiction over the Indians has been claimed or exercised. The restrictions imposed by the law of 1802 come strictly within the power to regulate trade; not as an incident, but as a part of the principal power. It is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries. Embargoes have been imposed, laws of non-intercourse have been passed, and numerous acts, restrictive of trade, under the power to regulate commerce with foreign nations.

In the regulation of commerce with the Indians, congress have exercised a more limited power than has been exercised in reference to foreign countries. The law acts upon our own citizens, and not upon the Indians, the same as the laws referred to act upon our own citizens in their foreign commercial intercourse. It will scarcely be doubted by any one, that, so far as the Indians, as distinct communities, have formed a connection with the federal government, by treaties, that such connection is political, and is equally binding on both parties. This cannot be questioned, except upon the ground that, in making these treaties, the federal government has transcended the treaty-making power. Such an objection, it is true, has been stated; but it is one of modern invention, which arises out of local circumstances; and is not only opposed to the uniform practice of the government, but also to the letter and spirit of the constitution.

But the inquiry may be made, is there no end to the exercise of this power over Indians within the limits of a state by the general government? The answer is, that, in its nature, it must be limited by circumstances.

If a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a state would be proper need not now be considered, if indeed it be a judicial question. Such a question does not seem to arise in this case. So long as treaties and laws remain in full force, and apply to Indian nations exercising the right of self-government, within the limits of a state, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional.

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government in the extinguishment of their title, and especially by the compact with the state of Georgia. It is a question, not of abstract right, but of public policy. I do not mean to say that the same moral rule which should regulate the affairs of private life should not be regarded by communities or nations. But a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or eventually consent to become amalgamated in our political communities.

At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them, and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an

independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.

This state of things can only be produced by co-operation of the state and federal governments. The latter has the exclusive regulation of intercourse with the Indians; and so long as this power shall be exercised it cannot be obstructed by the state. It is a power given by the constitution, and sanctioned by the most solemn acts of both the federal and state governments; consequently it cannot be abrogated at the will of a state. It is one of the powers parted with by the states, and vested in the federal government. But if a contingency shall occur which shall render the Indians who reside in a state incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them the ægis of its laws. Under such circumstances the agency of the general government, of necessity, must cease.

But if it shall be the policy of the government to withdraw its protection from the Indians who reside within the limits of the respective states, and who not only claim the right of self-government, but have uniformly exercised it, the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the federal government.

The plaintiff who prosecutes this writ of error entered the Cherokee country, as it appears, with the express permission of the president, and under the protection of the treaties of the United States and the law of 1802. He entered, not to corrupt the morals of this people, nor to profit by their substance, but to teach them, by precept and example, the Christian religion. If he be unworthy of this sacred office; if he had any other object than the one professed; if he sought, by his influence, to counteract the humane policy of the federal government towards the Indians, and to embarrass its efforts to comply with its solemn engagement with Georgia, though his sufferings be illegal, he is not a proper object of public sympathy.

§ 52. *The statutes of Georgia of 1829 and 1830, concerning the Cherokee Indians, being repugnant to the treaties and laws of the United States, are invalid.*

It has been shown that the treaties and laws referred to come within the due exercise of the constitutional powers of the federal government; that they remain in full force, and consequently must be considered as the supreme laws of the land. The laws throw a shield over the Cherokee Indians. They guarantied to them their rights of occupancy, of self-government and the full enjoyment of those blessings which might be attained in their humble condition. But, by the enactments of the state of Georgia, this shield is broken in pieces, the infant institutions of the Cherokees are abolished, and their laws annulled. Infamous punishment is denounced against them for the exercise of those rights which have been most solemnly guarantied to them by the national faith.

Of these enactments, however, the plaintiff in error has no right to complain, nor can he question their validity, except in so far as they affect his interests. In this view, and in this view only, has it become necessary, in the present case, to consider the repugnancy of the laws of Georgia to those of the Union.

Of the justice or policy of these laws it is not my province to speak; such

considerations belonging to the legislature by whom they were passed. They have, no doubt, been enacted under a conviction of right, by a sovereign and independent state, and their policy may have been recommended by a sense of wrong under the compact. Thirty years have elapsed since the federal government engaged to extinguish the Indian title within the limits of Georgia. That she has strong ground of complaint arising from this delay must be admitted; but such considerations are not involved in the present case; they belong to another branch of the government. We can look only to the law, which defines our power and marks out the path of our duty.

Under the administration of the laws of Georgia, a citizen of the United States has been deprived of his liberty; and, claiming protection under the treaties and laws of the United States, he makes the question, as he has a right to make it, whether the laws of Georgia, under which he is now suffering an ignominious punishment, are not repugnant to the constitution of the United States, and the treaties and laws made under it. This repugnancy has been shown; and it remains only to say, what has before been often said by this tribunal, of the local laws of many of the states in this Union, that, being repugnant to the constitution of the United States, and to the laws made under it, they can have no force to divest the plaintiff in error of his property or liberty.

MR. JUSTICE BALDWIN dissented, stating that, in his opinion, the record was not properly returned upon the writ of error, and ought to have been returned by the state court, and not by the clerk of that court. As to the merits, he said his opinion remained the same as was expressed by him in the case of *The Cherokee Nation v. The State of Georgia*, at the last term (§§ 111-38, *infra*).

#### THE KANSAS INDIANS.

(5 Wallace, 737-761. 1866.)

##### ERROR to the Supreme Court of Kansas.

STATEMENT OF FACTS.—These were three distinct cases involving the question whether the state of Kansas had power to tax the lands held in severalty by Indians of the Shawnee, Wea and Miami tribes. The further facts appear sufficiently in the opinion of the court. In each case a separate opinion was delivered.

Opinion by MR. JUSTICE DAVIS.

#### IN THE CASE OF THE SHAWNEES.

The sole question presented by this record is whether the lands belonging to the united tribes of Shawnee Indians, residing in Kansas, are taxable.

The authorities of the county of Johnson asserting the right, and the highest court of the state having sustained it, the question is properly here for consideration. The solution of it depends on the construction of treaties, the relations of the general government to the Indian tribes, and the laws of congress. In order to a proper understanding of the rights of these Indians, it is necessary to give a short history of some of the treaties that have been made with them.

In 1825 the Shawnee tribe was divided — part being in Missouri and part in Ohio. The Missouri Shawnees were in possession of valuable lands near Cape



Girardeau, and in that year (7 Stat. at Large, 284) ceded them, by treaty, to the United States, and, in consideration of the cession, received for their use, and those of the same nation in Ohio who chose to join them, a tract of country in Kansas, embracing fifty square miles. In pursuance of the favorite policy of the government to persuade all the Indian tribes *east* of the Mississippi to migrate and settle on territory, to be secured to them, *west* of that river, in 1831 (*id.*, 355), a convention was concluded with the Ohio Shawnees — they being willing to remove west, in order to obtain “a more permanent and advantageous home for themselves and their posterity.” In exchange for valuable lands and improvements in Ohio, they obtained, by patent, in fee-simple to them and their heirs forever, so long as they shall exist as a nation, and remain upon the same, one hundred thousand acres of land, to be located under the direction of the president of the United States, within the tract granted in 1825 to the Missouri Shawnees.

This treaty contained words of promise that the same care, superintendence and protection, which had been extended over them in Ohio, should be assured to them in the country to which they were to remove, and also a *guaranty* that their lands should never be within the bounds of any state or territory, nor themselves subject to the laws thereof. In obedience to the obligations of this treaty, they removed and united with their brethren, who had preceded them from Missouri, but were soon met by the advancing tide of civilization. In view of the rapid increase of population in the Kansas country, and the small number of Shawnees — the tribe does not now contain over twelve hundred souls — it was deemed advisable to lessen their territorial limits.

Accordingly another treaty was concluded with them on the 2d day of November, 1854. 10 Stat. at Large, 1063. By this treaty the united Shawnee nation ceded to the United States all the large domain granted to them by the treaty of 1825. In consideration for this cession, two hundred thousand acres of these same lands were re-ceded to them, and they also obtained annuities and other property. This treaty was peculiar in some of its provisions. It did not contemplate that the Indians should enjoy the whole tract, as the quantity for each individual was limited to two hundred acres. The unselected lands were to be sold by the government, and the proceeds appropriated to the uses of the Indians. It also recognized that part of the lands selected by the Indians could be held in common, and part in severalty. If held in common, they were to be assigned in a compact body; if in severalty, the privilege was conceded of selecting anywhere in the tract outside of the common lands.

The Indians who held separate estates were to have patents issued to them, with such guards and restrictions as congress should deem advisable for their protection. Congress afterwards (11 Stat. at Large, 430) directed the lands to be patented, subject to such restrictions as the secretary of the interior might impose; and these lands are now held by these Indians, under patents, without power of alienation, except by consent of the secretary of the interior. This treaty was silent about the guaranties of the treaty of 1831; but the Shawnees expressly acknowledged their dependence on the government of the United States, as formerly they had done, and invoked its protection and care. Prior to the ratification of this treaty (although not before it was signed), the organic act for the territory of Kansas was passed, and on the 29th of January, 1861, Kansas was admitted into the Union; but the rights of the Indians, the powers of congress over them, their lands and property, and

the stipulations of treaties, were fully preserved, and in the same words, both in the organic act and the act for the admission of Kansas.

The Ohio Shawnees, when they ceded their lands in Ohio, did it in pursuance of an act of congress of May 28, 1830 (4 Stat. at Large, 411), which assured them that the country to which they were translated should be secured and guarantied to them and their heirs forever. The well-defined policy of the government demanded the removal of the Indians from organized states, and it was supposed at the time the country selected for them was so remote as never to be needed for settlement. This policy was deemed advantageous to their interests, as it separated them from the corrupting influences of bad white men, and secured for them a permanent home. It is plain to be seen that the covenants with the Shawnees in the treaty of 1861, that they should not be subject to the laws of organized states or territories, nor their lands included within their boundaries, unless with their own consent, signified to the president, must have materially influenced their decision to part with their Ohio possessions and join their brethren in Kansas. They therefore removed under the assured protection of the government, to enjoy, as they expected, in perpetuity, free from encroachment, a home adapted to their habits and customs. But these expectations were not to be realized, for the spirit of American enterprise in a few years reached their country, and the same white population that pressed upon them in Ohio and Missouri followed them there.

The present and future wants of this population created the necessity for the treaty of 1854, and the segregation of lands allowed by it, in connection with the power to sell these unselected tracts, invited what followed — a mixed occupancy of the same territory by the red and white men — the very matter which dictated the removal of the Indians from the older states.

§ 53. *Under the treaty of 1854 between the United States and the Shawnee Indians and the preceding treaties between them, the lands held in severalty by the individual members of that tribe could not be taxed by the state of Kansas.*

It is insisted, as the guaranties of the treaty of 1831 are not in express words reaffirmed in the treaty of 1854, they are, therefore, abrogated, and that the division of the Indian territory into separate estates so changes the *status* of the Indians that the property of those who hold in severalty is liable to state taxation. It is conceded that those who hold in common cannot be taxed. If such are the effects of this treaty, they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the government to make a distinction in favor of the Indians who held in common, and against those who held in severalty. If the Indians thus holding had less rights than their more favored brethren who enjoy their possessions in common and in compact form, would not good faith have required that it should have been so stated in the treaty? The general pledge of protection substantially accorded in this treaty as in all the other treaties with this tribe forbids the idea that government intended to withdraw its protection from one part of the tribe and extend it to the other.

But it is not necessary to import the guaranties of the treaty of 1831 into that of 1854 in order to save the property of the entire tribe from state taxation. If the necessities of the case required us to do so, we should hesitate to declare that, in the understanding of the parties, the promises under which the treaty of 1831 were made, and the guaranties contained in it, were all abandoned when the treaty of 1854 was concluded. If the tribal organization of the Shawnees is preserved intact and recognized by the political department of

the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of congress, from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the constitution, treaties and laws of congress.

§ 54. *Rights of Indians whose tribal organization is recognized by the United States.*

It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, "but until they are clothed with the rights and bound to all the duties of citizens," they enjoy the privilege of total immunity from state taxation. There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property or other rights which it would have been competent to make if Kansas had not been admitted into the Union. The treaty of 1854 left the Shawnee people a united tribe, with a declaration of their independence on the national government for protection and the vindication of their rights. Ever since this their tribal organization has remained as it was before. They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom, by which they punish offenses, adjust differences, and exercise a general oversight of the affairs of the nation. This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common. Their machinery of government, though simple, is adapted to their intelligence and wants, and effective, with faithful agents to watch over them. If broken into, it is the natural result of Shawnees and whites owning adjoining plantations, and living and trafficking together as neighbors and friends. But the action of the political department of the government settles, beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal organization. Within a very recent period their head men negotiated a treaty with the United States, which, for some reason not explained in the record, was either not sent to the senate, or, if sent, not ratified, and they are under the charge of an agent who constantly resides with them. While the general government has a superintending care over their interests, and continues to treat with them as a nation, the state of Kansas is estopped from denying their title to it. She accepted this *status* when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of congress, and their property is withdrawn from the operation of state laws.

It follows, from what has been said, that the supreme court of Kansas erred in not perpetuating the injunction and granting the relief prayed for.

## IN THE CASE OF THE WEAS.

§ 55. *The principles decided in the case of the Shawnees applied to this case.*

The opinion just rendered in the case of Blue Jacket, representing the united tribe of Shawnee Indians, controls the decision of this case. The relations of the general government to the Wea tribe, and their relations to the state of Kansas, are settled by the agreed statement of facts in the record, in connection with the treaty of 10th August, 1854. 10 Stat. at Large, 1082. This tribe, being weak in numbers, united with three other tribes, equally weak, and ceded to the United States large possessions obtained under former treaties, reserving for each individual only one hundred and sixty acres of land, and ten sections for the common property of the united tribes, with one section in addition, for the American Indian Mission Association. The reservation of the limited quantity for each individual was not to be in a compact body. Individuals and heads of families had the right of selection, as in the Shawnee treaty, and the lands were to be patented, with restrictions upon alienation, as the president or congress should prescribe. The unselected lands were to be sold, and the proceeds paid over to the Indians. This policy produced, as in the case of the Shawnees, a mixed occupancy of the original Indian territory, and, in consequence, the same difficulties. These difficulties must have been foreseen by the people of Kansas and the general government, but could not have been within the apprehension of the limited intelligence of the Indians. The basis of the treaty, doubtless, was, that the separation of estates and interests would so weaken the tribal organization as to effect its voluntary abandonment, and, as a natural result, the incorporation of the Indians with the great body of the people.

But this result, desirable as it may be, has not yet been accomplished with the Wea tribe, and, therefore, their lands cannot be taxed. It is conceded that the tribal organization is kept up and maintained in the county of Miami, where they live, and where the annuities are paid to them, under the supervision of the Indian agent of the tribe. And it is further conceded that the chiefs and head men of the tribe represent it and transact its business, receive funds from the United States for tribal purposes and disburse them, and that an agent for the tribe resides in the county, where he transacts the business of the United States with the tribe through their chiefs and head men. These concessions place the Wea Indians in the same category with the Shawnees.

§ 56. *The conferring of rights and protection upon the Indians by the state, of which they avail themselves, does not subject them to the laws of the state, as long as they are protected and their nationality recognized by the federal government.*

It is argued, because the Indians seek the courts of Kansas for the preservation of rights and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the secretary of the interior, that they submit themselves to all the laws of the state. But the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people. Kansas is not obliged to confer any rights on them. Because a sound policy may dictate the wisdom of treating them, in some respects, as she treats her own citizens, and thereby weaning them from the ancient attachment to their own customs, they are none the less a separate people, under the protection of the general government. This policy may eventually succeed in disbanding the tribe, but until it does, the Indians cannot look to Kansas for

protection, nor can the general laws of the state taxing real estate within its limits reach their property.

But, it is said, the protection promised the Shawnees is not accorded to the Weas, in the treaty of August, 1854. Not so, for in the tenth article they agree "to commit no wrong on either Indian or citizen; and if difficulties should arise, to abide by the laws of the United States in such cases made and provided, as they expect to be protected and have their rights vindicated by those laws." Did not the government accord to them the protection invoked, by executing the treaty? It surely did not need that the United States should say in words, we agree to protect you and vindicate your rights. But the eleventh article fixes beyond dispute the reciprocal relations of the general government and these Indians. It declares the object of the treaty is to advance the interests of the Indians; and if it should prove ineffectual, "it was agreed that the president, with the advice and consent of the senate, should adopt such policy in the management of their affairs as in his judgment should be proper, or congress might make such provision by law as experience should prove to be necessary." How far the powers of the president or congress extend under this article it is unnecessary to discuss or decide. It is sufficient to say that it leaves the Indians most clearly under the protection of the general government and withdraws their property from the jurisdiction of Kansas.

#### IN THE CASE OF THE MIAMIS.

§ 57. *The principles determined in the two previous cases applied to this.*

The principle of the foregoing cases of the Shawnee and Wea tribes of Indians is also decisive of this controversy. The Miami tribe hold their head rights in severalty, by virtue of the provisions of the treaty which was proclaimed by the president on the 4th of August, 1854. 10 Stat. at Large, 1093.

It is unnecessary to pursue the history of this tribe through the various treaties which have been concluded between them and the United States. It is sufficient to state that they are a nation of people, recognized as such by the general government in the making of treaties with them, and the relations always maintained towards them, and cannot, therefore, be taxed by the authorities of Kansas. Their tribal organization is fully preserved, and they are under the supervision of an agent, who resides in the county where their lands are situated. It is not necessary to decide, until the question arises, what powers have been conferred on congress or the president by virtue of the eleventh article of the treaty of 1854, being the same as the eleventh article of the Wea treaty.

§ 58. *Where a provision in an Indian treaty exempts their lands from "levy, sale, execution and forfeiture," it embraces exemption from levy and sale for non-payment of taxes as well as upon ordinary judicial proceedings.*

There is, however, one provision in the Miami treaty — being in addition to the securities furnished the Shawnees and Weas — which, of itself, preserves the Miami lands from taxation. This particular provision exempts the lands from "levy, sale, execution and forfeiture." It is argued that these words refer to a levy and sale under judicial proceedings, but such a construction would be an exceedingly narrow one, whereas enlarged rules of construction are adopted in reference to Indian treaties. In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are sus-

ceptible of a more extended meaning than their plain import as connected with the tenor of their treaty." 6 Pet., 582 (§§ 12-52, *supra*).

Applying this principle to the case in hand, is it not evident that the words "levy, sale and forfeiture" are susceptible of a meaning which would extend them to the ordinary proceedings for the collection of taxes? Taxes must be first levied, and they cannot be realized without the power of sale and forfeiture in case of non-payment. The position, it seems to us, is too plain for argument. The object of the treaty was to hedge the lands around with guards and restrictions so as to preserve them for the permanent homes of the Indians. In order to accomplish this object they must be relieved from every species of levy, sale and forfeiture—from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

*Reversed.*

§ 59. Whether a person is an Indian.—In a trial for murder the question arose as to who was an Indian, and the rule was laid down that the child must follow the condition of the mother—the doctrine of the civil law,—and that the *quantum* of Indian blood in the veins was not at all determinative. *United States v. Sanders*, Hemp., 483.

§ 60. The children of a citizen of the United States and an Indian follow the *status* of the father, and are citizens of the United States if he was so. The *quantum* of white or Indian blood is immaterial. *Ex parte Reynolds*, 5 Dill., 394 (§§ 142-48).

§ 61. An Indian who lives off a reservation designated for his tribe, with the consent of his mother and the Indian agent, and among white people, for eight or ten years, is still an Indian within the meaning of the laws of the United States forbidding the sale of intoxicating liquors to minors. *United States v. Osborne*,\* 6 Saw., 406.

§ 62. Reservations.—The boundaries of the Pyramid Lake Indian reservation are those designated on the map accompanying the president's order establishing the reservation, and not the line indicated by the surveyor's monuments or marked by order of the Indian agent. *United States v. Leathers*,\* 6 Saw., 17.

§ 63. Certain Ponca Indians who, with their tribe, had been removed to the Indian Territory, renounced their tribal relations and removed to the Omaha reservation, where they settled with the consent of that tribe. General Crook, acting under orders of the commissioner of Indian affairs, removed them from the reservation and was about to remove them by force to the Indian Territory, when, upon a writ of *habeas corpus*, it was held that, although they might properly be removed from the Omaha reservation, they could not, in the absence of hostilities, be removed by force to the Indian Territory, and that they were entitled to their release. *United States v. Crook*,\* 5 Dill., 453.

§ 64. The president has the right, without direct authority, to set apart and establish an Indian reservation, and the Pyramid Lake Indian reservation, as set apart and established by the president, is a valid reservation for the Pah Utes and other Indians residing therein, and such reservation is "Indian country" within the meaning of the Revised Statutes of the United States. *United States v. Leathers*,\* 6 Saw., 17.

§ 65. Indian country.—The definition of the words "Indian country," as found in section 1 of the act of congress of 1834, does not apply since that section was repealed by section 5596, Revised Statutes; and it seems that the term as used in section 2140, Revised Statutes, means an Indian reservation, and not merely the territory to which the Indian title has not been extinguished. *Pelcher v. United States*,\* 3 McC., 510; 11 Fed. R., 47.

§ 66. It seems that colored persons who were never held as slaves in the Indian country, but who may have been slaves elsewhere, are like other citizens of the United States, and have no more right in the Indian country than other citizens have. *United States v. Payne*, 2 McC., 289.

§ 67. The statutory definition of "Indian country," given by the intercourse act of 1834, was repealed by section 5596, Revised Statutes. *United States v. Leathers*,\* 6 Saw., 17.

§ 68. Rights as citizens.—It seems that an Indian, whether of the whole or half-blood, who is a citizen of the United States, cannot be excluded from voting on the ground of being an Indian. *McKay v. Campbell*, 5 Am. L. T. Rep., 407. See CITIZENS, §§ 10-17.

§ 69. Indian tribes within the limits of the United States have always been held to be distinct and independent political communities, retaining a tribal autonomy, though subject to the protection of the government. Hence, one born in Oregon in 1823, of a British father and an Indian mother, might elect to follow the condition of his father or his mother, but in either

case, in the absence of previous naturalization under the laws of the United States, he would not be entitled to exercise the elective franchise in this country. *Ibid.*

§ 70. Half-blooded Indians, having such tribal relations as to have been made participants in the treaty of September 30, 1854, with the Chippewas of Lake Superior, under the seventh clause of the seventh article thereof, were held not to be entitled to rights of pre-emption under the act of 1841, as citizens of the United States. *Relation of Indians to Citizenship*,\* 7 Op. Att'y Gen'l, 746.

§ 71. It seems that the fact of Indians being born in this country does not make them citizens of the United States. They are domestic subjects of the government and not sovereign constituent ingredients of it. *Ibid.*

§ 72. Indians can become citizens by naturalization, but not under existing general acts of congress. It would have to be by virtue of some treaty or special act of congress. *Ibid.*

§ 73. A tribal Indian is not born subject to the jurisdiction of the United States within the meaning of the fourteenth amendment, and is not therefore entitled to vote, unless he becomes a citizen of the United States by its consent. *United States v. Osborne*,\* 6 Saw., 406.

§ 74. An Indian possesses an inherent right of expatriation, and on renouncing his tribal relations may terminate his allegiance thereto for the purpose of adopting our civilization. *United States v. Crook*,\* 5 Dill., 453.

§ 75. Tribal Indians are not citizens of the United States, but occupy the same position before the law as though they were citizens of a power entirely independent of us, or were the people who were the citizens of a foreign power. *Ex parte Reynolds*, 5 Dill., 394 (§§ 142-47).

§ 76. *Lands.*—The treaty of January 31, 1855, with the Wyandot Indians contemplated vesting the title of the lands therein mentioned in the heads of families by patent direct from the United States to the heads of families, and the other members of the families were not entitled to undivided portions of the land allotted to the heads. *Hicks v. Buttrick*,\* 3 Dill., 418.

§ 77. According to the provisions of the treaty of Washington of March 24, 1832, with the Creek Indians, the lands to be selected by the president for the benefit of the orphan children of the tribe could not be taken from lands reserved to heads of families by the previous stipulations of the treaty, and a selection of such lands was void and the purchaser took no title. *Ladiga v. Roland*,\* 2 How., 591.

§ 78. A grandmother with whom resided some of her grandchildren, her children being all married and residing elsewhere, is the head of a family within the meaning of the treaty of Washington of March 24, 1832, with the Creek Indians. *Ibid.*

§ 79. A state may grant the fee in lands occupied by Indians, subject to their right. That right consists in occupancy, and until it is extinguished by purchase no possession adverse to it can be taken. *Doe ex dem. Godfrey v. Beardsley*, 2 McL., 412.

§ 80. The Oneida Indians ceded to the United States certain lands, reserving to themselves one hundred acres for each Indian, to be held as other Indian lands are held. A number of the tribe cut timber from said reservation, the same not being then occupied in severalty, made it into saw logs and sold them to defendant. It was held that the Indians possessed the right of occupancy and use of the lands; they might clear them of timber for the purpose of cultivation; cutting beyond that constituted waste, and when so severed the timber became the property of the United States absolutely; and hence the government was entitled to maintain an action of replevin for the same against any one coming into possession of such property. *United States v. Cook*, 6 Ch. Leg. N., 317; 19 Wall., 591.

§ 81. By the terms of a treaty between the United States and the Oneida Indians, the purchase of certain lands was contracted for by the government, with a reservation in favor of the Indians of one hundred acres for each individual, to be held as other Indian lands. The government also prohibited the cutting of timber upon the reservation, except such as was necessary for the personal use of the Indians. Held, that where two of the tribe cut a large quantity and sold it to the defendant, such being cut and sold for the purpose of supporting the Indians and their families, replevin would not lie at the suit of the government. *United States v. Foster*,\* 3 Ch. Leg. N., 113.

§ 82. Lands granted by the United States to an Indian may be sold after the death of the grantee by the administrator of his estate, acting under orders of the proper probate court, for the payment of the debts of the intestate, without the consent of the president, even though by the conditions of the grant the land was never to be conveyed without such consent. *Lowry v. Weaver*,\* 4 McL., 82.

§ 83. Indians have rights of occupancy to their lands; but they are only rights of occupancy, incapable of alienation or being held by any other than common right without permission of the government. (Per BALDWIN, J.) *Cherokee Nation v. Georgia*, 5 Pet., 1 (§§ 111-38).

§ 84. *Taxing property of Indians.*—The lands of Indians still maintaining tribal relations are not taxable by the state within which the lands are situated, and even after such lands have been sold to white persons, and the Indians have agreed to give possession at a given

time, such lands are not taxable while the Indians remain in possession, and a law taxing such lands, and providing for their sale if the taxes are not paid, is void, though it provided that by none of the tax proceedings shall the occupancy of the Indians be disturbed. *The New York Indians*,\* 5 Wall., 761.

§ 85. While lands patented to the Miami Indians, under treaty of June 5, 1854 (10 U. S. Stats. at Large, 1092), entered into between them and the government, are exempted from taxation by the state of Kansas, yet when the title to any part of said lands passes from the Indians and vests in a citizen, the liability to taxation immediately revives. *Peck v. Miami County*, 4 Dill., 370.

§ 86. The internal revenue system of this country has not, in any instance, or for any purpose, been extended over the Indian country. *Taxation of Indian Cotton*,\* 13 Op. Att'y Gen'l, 208.

§ 87. Cotton raised in the Choctaw Nation, by an Indian of that nation, cannot be taxed in any collection district of the United States, outside of the Choctaw country, while *in transitu*, and in the hands of the original owner, or in any collection district in which it may be sold by the original owner. *Ibid.*

§ 88. Tobacco belonging to an Indian may be seized in the Indian territory for a violation of the internal revenue laws, by virtue of section 107 of the internal revenue act of July, 1868 (15 U. S. Stats. at Large, 167). *Case of Edward Dwight, a Choctaw Indian*,\* 18 Op. Att'y Gen'l, 546.

§ 89. Lands in Kansas, acquired under the treaty between the United States and the confederate tribes of Sacs and Foxes of the Mississippi, and held in fee-simple by a member of that tribe, after the removal of her people to the Indian territory, are liable to taxation by Kansas. *Pennock v. Commissioners*, 18 Otto, 44.

§ 90. *Contracts of Indians*.—An Indian residing with his tribe is as competent to bind himself by contract as any other alien, except in relation to the payment and application of money and goods due to him under a treaty, as provided by the act of March, 1847 (9 U. S. Stats. at Large, 203). *Gho v. Jules*,\* 1 Wash. T'y, 825.

§ 91. It is a matter of executive discretion whether, and, if at all, when the government of the United States shall pay engagements of indebtedness made by tribes of Indians to individuals. *Contracts of Indians*,\* 6 Op. Att'y Gen'l, 462.

§ 92. By the act of June, 1834, as amended by the act of March, 1847, all executory contracts "made and entered into by any Indian for the payment of money or goods" are made null and void. But this is not applicable to executory contracts entered into by a tribe or nation of Indians, but it rests in the discretion granted by the foregoing acts, whether or not such tribal contracts shall be confirmed. *Contracts of the Potawatomie Indians*,\* 6 Op. Att'y Gen'l, 49.

§ 93. *Tribal relations*.—When the secretary of the interior and commissioner of Indian affairs decide that it is necessary that the tribal relations of Indians should be preserved, the federal courts will give effect to such decision and consider them as maintaining tribal relations. *United States v. Holliday*, 3 Wall., 407 (§§ 200-204).

§ 94. *Laws of Indians respected*.—The courts of the United States must give effect to the well established laws, usages and customs of the Wyandot Indians in respect to the disposition of property by descent or will while still existing as a tribe, and thereafter until a statute relating to descent and wills was enacted in Kansas. *Gray v. Coffman*,\* 3 Dill., 393.

§ 95. A will of a Wyandot Indian, made and probated according to the laws and usages of the Wyandot Indians need not be probated in the state courts, though the decedent died after the treaty of 1855, but before a statute of Kansas regulated descents and the probate of wills, and though the will was probated by the Wyandot council after the state statute relating to descents and wills went into effect. *Ibid.*

§ 96. An Indian is a competent witness to testify in civil and criminal cases under the statutes of Dakota. *Bruguier v. United States*,\* 1 Dak. T'y, 5.

§ 97. A white man may incorporate himself into an Indian tribe, be adopted by it and become a member of the tribe. *United States v. Ragsdale*,\* Hemp., 497.

§ 98. *Cherokees*.—No portion of the money appropriated for per capita payments to the Cherokees can be paid but by an equal distribution of it among those Indians individually. *Payment to the Cherokees*,\* 5 Op. Att'y Gen'l, 502.

§ 99. The Cherokee nation of Indians is not a foreign but a domestic territory, and so far as its laws are concerned occupies the same relation to the United States as an organized territory. *Mackey v. Coxe*,\* 18 How., 100.

§ 100. An administrator appointed under the laws of the Cherokee nation may give a valid power of attorney authorizing the agent to receive from the United States money due the estate; it would not be necessary for the agent to take out letters in the District of Columbia to make the payment to him valid. *Ibid.*



## JURISDICTION OVER INDIANS AND INDIAN COUNTRY. §§ 101-110.

§ 101. *Miscellaneous.*—The United States is not liable under sections 2154, 2155, Revised Statutes, to pay to a friendly Indian, within the Indian country, the value of property stolen by a negro. *United States v. Perryman*,\* 10 Otto, 235.

§ 102. It seems that Indians at peace with the United States are in no received sense of the word "an enemy," and cannot be judicially considered as embraced within it. Claim of Colonel Thomas and Accounting Officers,\* 4 Op. Att'y Gen'l, 81.

## II. JURISDICTION OVER INDIANS AND INDIAN COUNTRY.

SUMMARY — *Cannot sue in United States courts*, §§ 103, 104.— *Murder committed by an Indian within a state*, § 105.— *Murder committed in Indian country*, § 106.— *Indians living among citizens of United States*, § 107.— *Offense in country not within limits of a state*, § 108.— *White man adopted by Indians*, § 109.— *Offenses on reservations*, § 110.

§ 103. Indian tribes within the United States are not foreign nations but domestic dependent nations, under the pupillage or guardianship of the United States, and cannot maintain actions in the courts of the United States. *Cherokee Nation v. Georgia*, §§ 111-138.

§ 104. An Indian residing within a state, though not a citizen of the United States, cannot maintain an action in a federal court against a citizen of the same state. *Karrahoo v. Adams*, § 139.

§ 105. In the absence of conflicting treaty stipulations or act of congress, the courts of a state have jurisdiction of a murder committed by an Indian residing on a reservation within the state, where the murder was committed within the state, but off the reservation. *United States v. Sa-coo-da-cat*, §§ 140, 141.

§ 106. In case of a murder in the Indian country the United States court for the western district of Arkansas has jurisdiction if either the person killed or the killer is a white man. If both are Indians the court has no jurisdiction. *Ex parte Reynolds*, §§ 142-147.

§ 107. When members of an Indian tribe scatter themselves among the citizens of the United States and live among the citizens of the United States they become merged in the mass of our people, owing complete allegiance to the government of the United States, and, equally with the citizens thereof, subject to the jurisdiction of its courts. *Ibid*.

§ 108. Indian tribes residing within the United States are subject to its authority, and when the country occupied by them is not within the limits of one of the states, congress may by law punish any offense committed there, no matter whether the offender was a white man or an Indian. *United States v. Rogers*, §§ 148, 149.

§ 109. A white man who had joined the Cherokee Indians and had been adopted by them was held not to be an "Indian" within the meaning of the act of congress of June 30, 1834, relating to trade and intercourse with the Indian tribes, and was liable for a murder committed by him in the Indian country. *Ibid*.

§ 110. The power to regulate commerce among the Indian tribes confers no jurisdiction on congress to provide for the punishment of offenses committed on reservations within the limits of a state. *United States v. Bailey*, §§ 150-155.

[NOTES.— See §§ 156-189.]

### CHEROKEE NATION v. STATE OF GEORGIA.

(5 Peters, 1-81. 1831.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in the solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of

which contains a solemn guaranty of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made.

Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause? The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state or the citizens thereof and foreign states, citizens or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party. The party defendant may, then, unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state, in the sense in which that term is used in the constitution?

§ 111. *The Cherokee nation is a state.*

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

§ 112. *The Cherokee nation is not a foreign state but a state dependent upon the United States.*

A question of much more difficulty remains. Do the Cherokees constitute a foreign state, in the sense of the constitution? The counsel have shown conclusively that they are not a state of the Union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories and laws it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive

right of regulating the trade with them and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell (7 Stats. at Large, 18), which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

§ 113. *The Indian tribes are regarded in the constitution as distinct from foreign states as well as from the states of the Union.*

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants, and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility.

These considerations go far to support the opinion that the framers of our constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a state or the citizens thereof and foreign states. In considering this subject, the habits and usages of the Indians in their intercourse with their white neighbors ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such that we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them considerable aid is furnished by that clause in the eighth section of the third article which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects

to which the power of regulating commerce might be directed are divided into three classes—foreign nations, the several states, and Indian tribes. When forming this article the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend that the words "Indian tribes" were introduced into the article empowering congress to regulate commerce for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly, and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in the view of the convention, this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations and were yet desirous of mentioning them particularly.

It has been also said that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. Foreign nations is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution, in this article, does not comprehend Indian tribes in the general term "foreign nations;" not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

§ 114. *An Indian tribe or nation, not being a state of the Union, nor a foreign nation, cannot maintain an action in the courts of the United States.*

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighboring people, asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the

laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true that the Cherokee nations have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future. The motion for an injunction is denied.

Opinion by MR. JUSTICE JOHNSON.

In pursuance of my practice in giving an opinion on all constitutional questions, I must present my views on this. With the morality of the case I have no concern; I am called upon to consider it as a legal question. The object of this bill is to claim the interposition of this court as the means of preventing the state of Georgia, or the public functionaries of the state of Georgia, from asserting certain rights and powers over the country and people of the Cherokee nation.

§ 115. *To bring an original suit in the supreme court of the United States, one party must be a state of the Union and the other another state or a foreign state.*

It is not enough, in order to come before this court for relief, that a case of injury, or of cause to apprehend injury, should be made out. Besides having a cause of action, the complainant must bring himself within that description of parties who alone are permitted, under the constitution, to bring an original suit to this court. It is essential to such suit that a state of this Union should be a party; so says the second member of the second section of the third article of the constitution; the other party must, under the control of the eleventh amendment, be another state of the Union, or a foreign state. In this case the averment is that the complainant is a foreign state.

Two preliminary questions then present themselves: 1. Is the complainant a foreign state in the sense of the constitution? 2. Is the case presented in the bill one of judicial cognizance?

Until these questions are disposed of we have no right to look into the nature of the controversy any further than is necessary to determine them. The first of the questions necessarily resolves itself into two: 1. Are the Cherokees a state? 2. Are they a foreign state?

1. I cannot but think that there are strong reasons for doubting the applicability of the epithet state, to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here be understood as speaking of the Cherokees under their present form of government; which certainly must be classed among the most approved forms of civil gov-

ernment. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is, I conceive, yet to be determined by the executive of these states. Until then, I must think that we cannot recognize it as an existing state, under any other character than that which it has maintained hitherto as one of the Indian tribes or nations.

§ 116. *An Indian tribe is not a foreign state.*

There are great difficulties hanging over the question whether they can be considered as states under the judiciary article of the constitution. 1. They never have been recognized as holding sovereignty over the territory they occupy. It is in vain now to inquire into the sufficiency of the principle that discovery gave the right of dominion over the country discovered. When the populous and civilized nations beyond the Cape of Good Hope were visited, the right of discovery was made the ground of an exclusive right to their trade, and confined to that limit. When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government, the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer. It cannot be questioned that the right of sovereignty, as well as soil, was notoriously asserted and exercised by the European discoverers. From that source we derive our rights, and there is not an instance of a cession of land from an Indian nation in which the right of sovereignty is mentioned as a part of the matter ceded.

It may be suggested that they were uniformly cessions of land without inhabitants; and, therefore, words competent to make a cession of sovereignty were unnecessary. This, however, is not a full answer; since soil, as well as people, is the object of sovereign action, and may be ceded with or without the sovereignty, or may be ceded with the express stipulation that the inhabitants shall remove. In all the cessions to us from the civilized states of the old world, and of our transfers among ourselves, although of the same property, under the same circumstances, and even when occupied by these very Indians, the express cession of sovereignty is to be found.

In the very treaty of Hopewell, the language or evidence of which is appealed to as the leading proof of the existence of this supposed state, we find the commissioners of the United States expressing themselves in these terms: "The commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States on the following conditions." This is certainly the language of sovereigns and conquerors, and not the address of equals to equals. And again, when designating the country they are to be confined to, comprising the very territory which is the subject of this bill, they say: "Article 4. The boundary allotted to the Cherokees for their hunting-grounds" shall be as therein described. Certainly this is the language of concession on our part, not theirs; and when the full bearing and effect of those words, "for their hunting-grounds," is considered, it is difficult to think that they were then regarded as a state, or even intended to be so regarded. It is clear that it was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the states, or United States, over the

territory within their limits. The pre-emptive right, and exclusive right of conquest in case of war, was never questioned to exist in the states which circumscribed the whole or any part of the Indian grounds or territory. To have taken it from them by direct means would have been a palpable violation of their rights. But every advance, from the hunter state to a more fixed state of society, must have a tendency to impair that pre-emptive right, and ultimately to destroy it altogether, both by increasing the Indian population and by attaching them firmly to the soil. The hunter state bore within itself the promise of vacating the territory, because when game ceased the hunter would go elsewhere to seek it. But a more fixed state of society would amount to a permanent destruction of the hope, and, of consequence, of the beneficial character of the pre-emptive right.

But it is said that we have extended to them the means and inducements to become agricultural and civilized. It is true; and the immediate object of that policy was so obvious as probably to have intercepted the view of ulterior consequences. Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the Revolution. The policy, therefore, of enticing them to the arts of peace, and to those improvements which war might lay desolate, was obvious; and it was wise to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments; a policy which their inveterate habits and deep-seated enmity has altogether baffled. But the project of ultimately organizing them into states, within the limits of those states which had not ceded or should not cede to the United States the jurisdiction over the Indian territory within their bounds, could not possibly have entered into the contemplation of our government. Nothing but express authority from the states could have justified such a policy, pursued with such a view. To pursue this subject a little more categorically.

If these Indians are to be called a state, then, 1. By whom are they acknowledged as such? 2. When did they become so? 3. And what are the attributes by which they are identified with other states.

As to the first question, it is clear that, as a state, they are known to nobody on earth but ourselves, if to us; how, then, can they be said to be recognized as a member of the community of nations? Would any nation on earth treat with them as such? Suppose, when they occupied the banks of the Mississippi or the seacoast of Florida, part of which in fact the Seminoles now occupy, they had declared war and issued letters of marque and reprisal against us or Great Britain, would their commissions be respected? If known as a state, it is by us, and us alone; and what are the proofs? The treaty of Hopewell does not even give them a name other than that of the Indians; not even nation or state; but regards them as what they were, a band of hunters, occupying, as hunting-grounds, just what territory we chose to allot them. And almost every attribute of sovereignty is renounced by them in that very treaty. They acknowledge themselves to be under the sole and exclusive protection of the United States. They receive the territory allotted to them as a boon, from a master or conqueror; the right of punishing intruders into that territory is conceded, not asserted as a right; and the sole and exclusive right of regulating their trade and managing all their affairs in such manner as the government of the United States shall think proper, amounting in terms to a relinquishment of all power, legislative, executive and judicial, to the United States, is yielded in the ninth article.

It is true that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent, such as any other company might be represented by. It cannot be supposed that he was to be recognized as a minister, or to sit in the congress as a delegate. There is nothing expressed and nothing implied that would clothe him with the attributes of either of these characters. As to a seat among the delegates, it could not be granted to him.

There is one consequence that would necessarily flow from the recognition of this people as a state, which of itself must operate greatly against its admission. Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should, indeed, force into the family of nations a very numerous and very heterogeneous progeny. The Catawbias, having indeed a few more acres than the republic of San Marino, but consisting only of eighty or a hundred polls, would then be admitted to the same dignity. They still claim independence, and actually execute their own penal laws, such as they are, even to the punishment of death, and have recently done so. We have many ancient treaties with them; and no nation has been more distinctly recognized, as far as such recognition can operate to communicate the character of a state.

But, secondly, at what time did this people acquire the character of a state? Certainly, not by the treaty of Hopewell; for every provision of that treaty operates to strip it of its sovereign attributes; and nothing subsequent adds anything to that treaty, except using the word nation instead of Indians. And as to that article in the treaty of Holston (7 Stats. at Large, 39), and repeated in the treaty of Tellico (7 Stats. at Large, 62), which guaranties to them their territory, since both those treaties refer to and confirm the treaty of Hopewell, on what principle can it be contended that the guaranty can go further than to secure to them that right over the territory, which is conceded by the Hopewell treaty, which interest is only that of hunting-grounds. The general policy of the United States, which always looked to these Indian lands as a certain future acquisition, not less than the express words of the treaty of Hopewell, must so decide the question.

If they were not regarded as one of the family of nations at the time of that treaty, even though at that time first subdued and stripped of the attributes of a state, it is clear that, to be regarded now as a state, they must have resumed their rank among nations at some subsequent period. But at what subsequent period? Certainly, by no decisive act until they organized themselves recently into a government; and I have before remarked that, until expressly recognized by the executive under that form of government, we cannot recognize any change in their form of existence. Others have a right to be consulted on the admission of new states into the national family. When this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations; and if they had been, Great Britain from that time blotted them from among the race of sovereigns. From that time Great Britain considered them as her subjects whenever she chose to claim their allegiance, and their country as hers both in soil and sovereignty. All the forbearance exercised towards them was considered as voluntary; and as their trade was more valuable to her than their territory, for that reason, and not from any supposed want of right to extend her laws over them, did she abstain from doing so.



And thirdly, by what attributes is the Cherokee nation identified with other states? The right of sovereignty was expressly assumed by Great Britain over their country at the first taking possession of it, and has never since been recognized as in them otherwise than as dependent upon the will of a superior. The right of legislation is in terms conceded to congress by the treaty of Hopewell, whenever they choose to exercise it. And the right of soil is held by the feeble tenure of hunting-grounds, and acknowledged on all hands subject to a restriction to sell to no one but the United States, and for no use but that of Georgia. They have in Europe sovereign and demi-sovereign states and states of doubtful sovereignty. But this state, if it be a state, is still a grade below them all; for not to be able to alienate without permission of the remainder-man or lord places them in a state of feudal dependence.

However, I will enlarge no more upon this point, because I believe in one view, and in one only, if at all, they are or may be deemed a state, though not a sovereign state, at least while they occupy a country within our limits. Their condition is something like that of the Israelites when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them; and such a form of government may exist, though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people or restraining their personal liberty, except as to their land and trade.

But in no sense can they be deemed a foreign state under the judiciary article. It does not seem necessary on this point to do more than put the question, whether the makers of the constitution could have intended to designate them when using the epithets "foreign" and "state." State and foreign state are used in contradistinction to each other. We had then just emerged ourselves from a situation having much stronger claims than the Indians for admission into the family of nations; and yet we were not admitted until we had declared ourselves no longer provinces but states, and shown some earnestness and capacity in asserting our claim to be enfranchised. Can it, then, be supposed that when using those terms we meant to include any others than those who were admitted into the community of nations, of whom most notoriously the Indians were no part?

The argument is that they were states; and if not states of the Union, must be foreign states. But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws nor government beyond what is required in a savage state. The distinction is clearly made in that section which vests in congress power to regulate commerce between the United States with foreign nations and the Indian tribes.

The language must be applied in one of three senses; either in that of the law of nations, or of the vernacular use, or that of the constitution. In the first, although it means any state not subject to our laws, yet it must be a state and not a hunter horde; in the vernacular, it would not be applied to a people within our limits and at our very doors; and in the constitution, the two epithets are used in direct contradistinction. The latter words were unneces-

sary, if the first included the Indian tribes. There is no ambiguity, though taken literally; and if there were, facts and circumstances altogether remove it. But had I been sitting alone in this cause, I should have waived the consideration of personal description altogether, and put my rejection of this motion upon the nature of the claim set up exclusively.

§ 117. *Judicial powers do not extend to political questions such as involve war between sovereign or quasi-sovereign states.*

I cannot entertain a doubt that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal. There is no possible view of the subject that I can perceive in which a court of justice can take jurisdiction of the questions made in the bill. The substance of its allegations may be thus set out:

That the complainants have been from time immemorial lords of the soil they occupy. That the limits by which they hold it have been solemnly designated and secured to them by treaty and by laws of the United States. That within those limits they have rightfully exercised unlimited jurisdiction, passing their own laws and administering justice in their own way. That in violation of their just rights so secured to them, the state of Georgia has passed laws authorizing and requiring the executive and judicial powers of the state to enter their territory and put down their public functionaries. That in pursuance of those laws, the functionaries of Georgia have entered their territory with an armed force, and put down all powers, legislative, executive and judicial, exercised under the government of the Indians.

What does this series of allegations exhibit, but a state of war and the fact of invasion? They allege themselves to be a sovereign, independent state, and set out that another sovereign state has, by its laws, its functionaries, and its armed force, invaded their state and put down their authority. This is war in fact, though, not being declared with the usual solemnities, it may, perhaps, be called war in disguise. And the contest is distinctly a contest for empire. It is not a case of *meum* and *tuum* in the judicial but in the political sense. Not an appeal to laws, but to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibility; to right himself, and not to appeal to any arbiter but the sword for the justice of his cause. If the state of Maine were to extend its laws over the province of New Brunswick, and send its magistrates to carry them into effect, it would be a parallel case. In the *Nabob of Arcot's Case*, 4 Bro. Cha. Ca., 180, and 1 and 2 Ves. Jr., 56, 371, a case of a political character not one-half so strongly marked as this, the courts of Great Britain refused to take jurisdiction, because it had its origin in treaties entered into between sovereign states; a case in which the appeal is to the sword and to Almighty justice, and not to courts of law or equity. In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation.

But there is still another ground in this case, which alone would have prevented me from assuming jurisdiction; and that is the utter impossibility of doing justice, at least even-handed justice, between the parties. As to restoring the complainant to the exercise of jurisdiction, it will be seen at once that that is no case for the action of a court; and as to quieting him in possession of the soil, what is the case on which the complainant would have this court to act? Either the Cherokee nation are a foreign state, or they are not. If they are not, then they cannot come here; and if they are, then how can we extend our jurisdiction into their country?

We are told that we can act upon the public functionaries in the state of Georgia without the limits of the nation. But suppose that Georgia should file a cross-bill, as she certainly may, if we can entertain jurisdiction in this case, and should in her bill claim to be put in possession of the whole Indian country, and we should decide in her favor; how is that decree to be carried into effect? Say as to soil; as to jurisdiction, it is not even to be considered. From the complainant's own showing we could not do justice between the parties. Nor must I be considered as admitting that this court could, even upon the other alternative, exercise a jurisdiction over the person, respecting lands under the jurisdiction of a foreign nation. I know of no such instance. In *Penn v. Lord Baltimore*, 1 Ves., 444, the persons were in England and the land within the king's dominions, though in America.

There is still another view in which this cause of action may be considered in regard to its political nature. The United States finding themselves involved in conflicting treaties, or at least in two treaties respecting the same property, under which two parties assert conflicting claims, one of the parties, putting itself upon its sovereign right, passes laws which in effect declare the laws and treaties under which the other party claims, null and void. It proceeds to carry into effect those laws by means of physical force; and the other party appeals to the executive department for protection. Being disappointed there the party appeals to this court, indirectly to compel the executive to pursue a course of policy which his sense of duty or ideas of the law may indicate should not be pursued. That is, to declare war against a state, or to use the public force to repel the force and resist the laws of a state, when his judgment tells him the evils to grow out of such a course may be incalculable.

What these people may have a right to claim of the executive power is one thing; whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government, which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty. There is, then, a great deal of good sense in the rule laid down in the *Nabob of Arcot's Case*, to wit, that, as between sovereigns, breaches of treaty were not breaches of contract cognizable in a court of justice, independent of the general principle that for their political acts states were not amenable to tribunals of justice.

There is yet another view of this subject which forbids our taking jurisdiction. There is a law of the United States, which purports to make every trespass set out in the bill to be an offense cognizable in the courts of the United States. I mean the act of 1802 (3 Stats. at Large, 139), which makes it penal to violate the Indian territory. The infraction of this law is in effect the burden of complaint. What, then, in fact, is this bill, but a bill to obtain an injunction against the commission of crimes? If their territory has been trespassed upon against the provisions of that act, no law of Georgia could repeal that act or justify the violation of its provisions. And the remedy lies in another court and form of action, or another branch of jurisprudence.

I cannot take leave of the case without one remark upon the leading argument, on which the exercise of jurisdiction here over cases occurring in the Indian country has been claimed for the complainant, which was that the

United States in fact exercised jurisdiction over it, by means of this and other acts, to punish offenses committed there. But this argument cannot bear the test of principle. For the jurisdiction of a country may be exercised over her citizens wherever they are, in right of their allegiance, as it has been in the instance of punishing offenses committed against the Indians. And, also, both under the constitution and the treaty of Hopewell, the power of congress extends to regulating their trade necessarily within their limits. But this cannot sanction the exercise of jurisdiction beyond the policy of the acts themselves, which are altogether penal in their provisions. I vote for rejecting the motion.

Opinion by MR. JUSTICE BALDWIN.

As jurisdiction is the first question which must arise in every cause, I have confined my examination of this entirely to that point, and that branch of it which relates to the capacity of the plaintiffs to ask the interposition of this court. I concur in the opinion of the court in dismissing the bill, but not for the reasons assigned. In my opinion there is no plaintiff in this suit, and this opinion precludes any examination into the merits of the bill, or the weight of any minor objections. My judgment stops me at the threshold, and forbids me to examine into the acts complained of.

As the reasons for the judgment of the court seem to me more important than the judgment itself, in its effects on the peace of the country and the condition of the complainants, and as I stand alone on one question of vital concern to both, I must give my reasons in full. The opinion of this court is of high authority in itself, and the judge who delivers it has a support as strong in moral influence over public opinion as any human tribunal can impart. The judge who stands alone in decided dissent on matters of the infinite magnitude which this case presents must sink under the continued and unequal struggle, unless he can fix himself by a firm hold on the constitution and laws of the country. He must be presumed to be in the wrong until he proves himself to be in the right. Not shrinking even from this fearful issue, I proceed to consider the only question which I shall ever examine in relation to the rights of Indians to sue in the federal courts, until convinced of my error in my present convictions.

My view of the plaintiffs being a sovereign independent nation or foreign state, within the meaning of the constitution, applies to all the tribes with whom the United States have held treaties, for if one is a foreign nation or state, all others in like condition must be so in their aggregate capacity, and each of their subjects or citizens, aliens, capable of suing in the circuit courts. This case, then, is the case of the countless tribes who occupy tracts of our vast domain, who, in their collective and individual characters as states or aliens, will rush to the federal courts in endless controversies growing out of the laws of the states or of congress.

In the spirit of the maxim *obsta principiis*, I shall first proceed to the consideration of the proceedings of the old congress, from the commencement of the Revolution up to the adoption of the constitution, so as to ascertain whether the Indians were considered and treated with as tribes of savages, or independent nations, foreign states on an equality with any other foreign state or nation, and whether Indian affairs were viewed as those of foreign nations, and in connection with this view refer to the acts of the federal government on the same subject.

§ 118. *The first relations of the United States with foreign nations.*

In 1781 (1 Laws U. S., 586, etc.) a department for foreign affairs was established, to which was intrusted all correspondence and communication with the ministers or other officers of foreign powers, to be carried on through that office, also with the governors and presidents of the several states, and to receive the applications of all foreigners, letters of sovereign powers, plans of treaties, conventions, etc., and other acts of congress relative to the department of foreign affairs; and all communications as well to as from the United States in congress assembled were to be made through the secretary, and all papers on the subject of foreign affairs to be addressed to him. The same department was established under the present constitution in 1789, and with the same exclusive control over all the foreign concerns of this government with foreign states or princes. 2 Laws U. S., 6, 7; 1 Stats. at Large, 28. In July, 1775, congress established a department of Indian affairs, to be conducted under the superintendence of commissioners. 1 Laws U. S., 597. By the ordinance of August, 1786, for the regulation of Indian affairs, they were placed under the control of the war department (1 Laws U. S., 614), continued there by the act of August, 1789 (2 Laws U. S., 32, 33; 1 Stats. at Large, 49), under whose direction they have ever since remained. It is clear, then, that neither the old nor new government did ever consider Indian affairs, the regulation of our intercourse or treaties with them, as forming any part of our foreign affairs or concerns with foreign nations, states or princes.

§ 119. *The original relations between the United States government and Indian tribes.*

I will next inquire how the Indians were considered; whether as independent nations or tribes, with whom our intercourse must be regulated by the law of circumstances. In this examination it will be found that different words have been applied to them in treaties and resolutions of congress; nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees, for instance, or the Cherokee nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject-matter acted on; believing it requires no reasoning to prove that the omission of the words prince, state, sovereignty or nation cannot divest a contracting party of these national attributes, which are inherent in sovereign power pre- and self-existing, or confer them by their use, where all the substantial requisites of sovereignty are wanting.

The proceedings of the old congress will be found in 1 Laws U. S., 597, commencing June 1, 1775, and ending September 1, 1788, of which some extracts will be given. June 30, 1775: "Resolved, that the committee for Indian affairs do prepare proper talks to the several tribes of Indians, as the Indians depend on the colonists for arms, ammunition and clothing, which are become necessary for their subsistence." "That the commissioners have power to treat with the Indians;" "to take to their assistance gentlemen of influence among the Indians." "To preserve the confidence and friendship of the Indians, and prevent their suffering for want of the necessaries of life, £40,000 sterling of Indian goods be imported." "No person shall be permitted to trade with the Indians without a license; traders shall sell their goods at reasonable prices; allow them to the Indians for their skins, and take no advantage of their distress and intemperance;" "the trade to be only at posts designated by the commissioners." Specimens of the kind of intercourse be-

tween the congress and deputations of Indians may be seen in pages 602 and 603. They need no incorporation into a judicial opinion.

In 1782 a committee of congress report that all the lands belonging to the six nations of Indians have been in due form put under the crown as appendant to the government of New York, so far as respects jurisdiction only; that that colony has borne the burden of protecting and supporting the six nations of Indians and their tributaries for one hundred years, as the dependents and allies of that government; that the crown of England has always considered and treated the country of the six nations as one appendant to the government of New York; that they have been so recognized and admitted by their public acts, by Massachusetts, Connecticut, Pennsylvania, Maryland and Virginia; that, by accepting this cession, the jurisdiction of the whole western territory belonging to the six nations and their tributaries will be vested in the United States, greatly to the advantage of the Union (p. 606). The cession alluded to is the one from New York, March 1, 1781, of the soil and jurisdiction of all the land in their charter west of the present boundary of Pennsylvania (1 Laws U. S., 471), which was executed in congress and accepted.

This makes it necessary to break in on the historical trace of our Indian affairs, and follow up this subject to the adoption of the constitution. The cession from Virginia, in 1784, was of soil and jurisdiction. So from Massachusetts, in 1785; from Connecticut, in 1800; from South Carolina, in 1787; from Georgia, in 1802. North Carolina made a partial cession of land, but a full one of her sovereignty and jurisdiction of all without her present limits, in 1789. 2 Laws U. S., 85; 1 Stats. at Large, 106.

Some states made reservations of lands to a small amount, but, by the terms of the cession, new states were to be formed within the ceded boundaries, to be admitted into the Union on an equal footing with the original states; of course, not shorn of their powers of sovereignty and jurisdiction within the boundaries assigned by congress to the new states. In this spirit congress passed the celebrated ordinance of July, 1787, by which they assumed the government of the northwestern territory, paying no regard to Indian jurisdiction, sovereignty or their political rights, except providing for their protection; authorizing the adoption of laws "which, for the prevention of crimes and injuries, shall have force in all parts of the district; and for the execution of process, civil and criminal, the governor has power to make proper division thereof." 1 Laws U. S., 477. By the fourth article, the said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States, subject to the articles of confederation, alterations constitutionally made, the acts and ordinances of congress.

This shows the clear meaning and understanding of all the ceding states, and of congress, in accepting the cession of their western lands up to the time of the adoption of the constitution. The application of these acts to the provisions of the constitution will be considered hereafter. A few more references to the proceedings of the old congress in relation to the Indian nations will close this view of the case.

In 1782 a committee, to whom was referred a letter from the secretary of war, reported "that they have had a conference with the two deputies from the Catawba nation of Indians; that their mission respects certain tracts of land reserved for their use in the state of South Carolina, which they wish may be so secured to their tribe as not to be intruded into by force, nor alienated even with their own consent; whereupon, resolved, that it be recom-

mended to the legislature of South Carolina to take such measures for the satisfaction and security of the said tribe as the said legislature shall in their wisdom think fit." 1 Laws U. S., 607. After this the Catawbas cannot well be considered an independent nation or foreign state. In September, 1783, shortly after the preliminary treaty of peace, congress, exercising the powers of acknowledged independence and sovereignty, issued a proclamation beginning in these words: "Whereas, by the ninth of the articles of confederation, it is among other things declared that the United States, in congress assembled, have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of every state, within its own limits, be not infringed or violated," prohibiting settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular state, and from purchasing or receiving gifts of land, without the express authority and directions of the United States in congress assembled. Conventions were to be held with the Indians in the northern and middle departments for the purpose of receiving them into the favor and protection of the United States, and of establishing boundary lines of property, for separating and dividing the settlements of the citizens from the Indian villages and hunting-grounds, etc. "Resolved, that the preceding measures of congress, relative to Indian affairs, shall not be construed to affect the territorial claims of any of the states, or their legislative rights within their respective limits. Resolved, that it will be wise and necessary to erect a district of the western territory into a distinct government, and that a committee be appointed to prepare a plan for a temporary government until the inhabitants shall form a "permanent constitution for themselves, and as citizens of a free, sovereign and independent state, be admitted to a representation in the Union." In 1786 a general ordinance was passed for the regulation of Indian affairs, under the authority of the ninth article of the confederation, which throws much light on our relations with them. Page 614. It closes with a direction that, in all cases where transactions with any nation or tribe of Indians shall become necessary for the purposes of the ordinance, which cannot be done without interfering with the legislative rights of a state, the superintendent within whose district the same shall happen shall act in conjunction with the authority of such state.

After accepting the cessions of the soil, and jurisdiction of the western territory, and resolving to form a temporary government, and create new, free, sovereign and independent states, congress resolved, in March, 1785, to hold a treaty with the western Indians. They gave instructions to the commissioners in strict conformity with their preceding resolutions, both of which were wholly incompatible with the national or sovereign character of the Indians, with whom they were about to treat. They will be found in pages 611, etc., and need not be particularized.

§ 120. *Treaty of Hopewell.*

I now proceed to the instructions which preceded the treaty of Hopewell, with the complainants, the treaty, and the consequent proceedings of congress, On the 15th of March, 1785, commissioners were appointed to treat with the Cherokees and other Indians, southward of them, within the limits of the United States, or who have been at war with them, for the purpose of making peace with them, and of receiving them into the favor and protection of the United States, etc. They were instructed to demand that all prisoners, negroes, and other property taken during the war, be given up; to inform the

Indians of the great occurrences of the last war; of the extent of country relinquished by the late treaty of peace with Great Britain; to give notice to the governors of Virginia, North and South Carolina, and Georgia, that they may attend if they think proper; and were authorized to expend \$4,000 in making presents to the Indians; a matter well understood in making Indian treaties, but unknown at least in our treaties with foreign nations, princes, or states, unless on the Barbary coast. A treaty was accordingly made, in November following, between the commissioners plenipotentiaries of the United States of the one part, and the head-men and warriors of all the Cherokees of the other. The word nation is not used in the preamble, or any part of the treaty, so that we are left to infer the capacity in which the Cherokees contracted, whether as an independent nation, or foreign state, or a tribe of Indians, from the terms of the treaty, its stipulations and conditions. "The Indians, for themselves and their respective tribes and towns, do acknowledge all the Cherokees to be under the protection of the United States." Article 3, 1 Laws U. S., 322. "The boundary allotted to the Cherokees for their hunting-grounds, between the said Indians and the citizens of the United States, within the limits of the United States, is and shall be the following," namely (as defined in article 4). "For the benefit and comfort of the Indians, and for the prevention of injuries and aggressions on the part of the citizens or Indians, the United States in congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they shall think proper." Article 9. "That the Indians may have full confidence in the justice of the United States respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to congress." Article 12.

This treaty is in the beginning called "article;" the word "treaty" is only to be found in the concluding line, where it is called "this definite treaty." But article or treaty, its nature does not depend upon the name given it. It is not negotiated between ministers on both sides representing their nations; the stipulations are wholly inconsistent with sovereignty; the Indians acknowledge their dependent character; hold the lands they occupy as an allotment of hunting-grounds; give to congress the exclusive right of regulating their trade and managing all their affairs as they may think proper. So it was understood by congress, as declared by them in their proclamation of 1st September, 1788 (1 Laws U. S., 619), and so understood at the adoption of the constitution.

The meaning of the words "deputy to congress," in the twelfth article, may be as a person having a right to sit in that body, as at that time it was composed of delegates or deputies from the states, not as at present, representatives of the people of the states; or it may be as an agent or minister. But if the former was the meaning of the parties, it is conclusive to show that he was not and could not be the deputy of a foreign state wholly separated from the Union. If he sat in congress as a deputy from any state, it must be one having a political connection with and within the jurisdiction of the confederacy; if as a diplomatic agent, he could not represent an independent or sovereign nation, for all such have an unquestioned right to send such agents when and where they please. The securing the right by an express stipulation of the treaty; the declared objects in conferring the right, especially when connected with the ninth article, show beyond a doubt it was not to represent a foreign state or nation, or one to whom the least vestige of independence or



sovereignty as to the United States appertained. There can be no dependence so anti-national, or so utterly subversive of national existence, as transferring to a foreign government the regulation of its trade and the management of all their affairs at their pleasure. The nation or state, tribe or village, headmen or warriors, of the Cherokees, call them by what name we please, call the articles they have signed a definite treaty, or an indenture of servitude; they are not, by its force or virtue, a foreign state, capable of calling into legitimate action the judicial power of this Union, by the exercise of the original jurisdiction of this court against a sovereign state, a component part of this nation. Unless the constitution has imparted to the Cherokees a national character never recognized under the confederation, and which, if they ever enjoyed, was surrendered by the treaty of Hopewell, they cannot be deemed in this court plaintiffs in such a case as this.

§ 121. *The relations between the United States and the Cherokee Indians under the constitution.*

In considering the bearing of the constitution on their rights, it must be borne in mind that a majority of the states represented in the convention had ceded to the United States the soil and jurisdiction of their western lands, or claimed it to be remaining in themselves; that congress asserted as to the ceded, and the states as to the unceded, territory, their right to the soil absolutely, and the dominion in full sovereignty, within their respective limits, subject only to Indian occupancy, not as foreign states or nations, but as dependent on and appendant to the state governments; that before the convention acted congress had erected a government in the northwestern territory, containing numerous and powerful nations or tribes of Indians, whose jurisdiction was contemned, and whose sovereignty was overturned, if it ever existed, except by permission of the states or congress, by ordaining that the territorial laws should extend over the whole district; and directing divisions for the execution of civil and criminal process in every part; that the Cherokees were then dependents, having given up all their affairs to the regulation and management of congress; and that all the regulations of congress over Indian affairs were then in force over an immense territory, under a solemn pledge to the inhabitants that whenever their population and circumstances would admit, they should form constitutions and become free, sovereign and independent states, on equal footing with the old component members of the confederation; that, by the existing regulations and treaties, the Indian tenure to their lands was their allotment as hunting-grounds, without the power of alienation; that the right of occupancy was not individual; that the Indians were forbidden all trade or intercourse with any person not licensed, or at a post not designated by regulation; that Indian affairs formed no part of the foreign concerns of the government; and that, though they were permitted to regulate their internal affairs in their own way, it was not by any inherent right acknowledged by congress or reserved by treaty, but because congress did not think proper to exercise the sole and exclusive right declared and asserted in all their regulations from 1775 to 1788, in the articles of confederation, in the ordinance of 1787, and the proclamation of 1788, which the plaintiffs solemnly recognized and expressly granted by the treaty of Hopewell, in 1785, as conferred on congress to be exercised as they should think proper.

To correctly understand the constitution, then, we must read it with reference to this well-known existing state of our relations with the Indians; the

United States asserting the right of soil, sovereignty and jurisdiction in full dominion; the Indians occupant of allotted hunting-grounds.

We can thus expound the constitution without a reference to the definitions of a state or nation by any foreign writer, hypothetical reasoning or the dissertations of the Federalist. This would be to substitute individual authority in place of the declared will of the sovereign power of the Union, in a written fundamental law. Whether it is the emanation from the people or the states is a moot question, having no bearing on the supremacy of that supreme law which, from a proper source, has rightfully been imposed on us by sovereign power. Where its terms are plain, I should, as a dissenting judge, deem it judicial sacrilege to put my hands on any of its provisions, and arrange or construe them according to any fancied use, object, purpose or motive, which, by an ingenious train of reasoning, I might bring my mind to believe was the reason for its adoption by the sovereign power, from whose hands it comes to me as the rule and guide of my faith, my reason and judicial oath. In taking out, putting in, or varying the plain meaning of a word or expression, to meet the results of my poor judgment, as to the meaning and intention of the great charter, which alone imparts to me my power to act as a judge of its supreme injunctions, I should feel myself acting upon it by judicial amendments, and not as one of its executors. I will not add unto these things; I will not take away from the words of this book of prophecy; I will not impair the force or obligation of its enactments, plain and unqualified in its terms, by resorting to the authority of names, the decisions of foreign courts, or a reference to books or writers. The plain ordinances are a safe guide to my judgment. When they admit of doubt, I will connect the words with the practice, usages and settled principles of this government, as administered by its fathers before the adoption of the constitution; and refer to the received opinion and fixed understanding of the high parties who adopted it; the usage and practice of the new government acting under its authority; and the solemn decisions of this court acting under its high powers and responsibility; nothing fearing that, in so doing, I can discover some sound and safe maxims of American policy and jurisprudence, which will always afford me light enough to decide on the constitutional powers of the federal and state governments, and all tribunals acting under their authority. They will, at least, enable me to judge of the true meaning and spirit of plain words put into the forms of constitutional provisions, which this court, in the great case of *Sturges and Crowninshield*, say "is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable." But the absurdity and injustice of applying the provision to the case must be so monstrous that all mankind would, without hesitation, unite in rejecting the application. 4 Wheat., 202, 203.

In another great case, *Cohens v. Virginia*, this court say: "The jurisdiction of this court, then, being extended by the letter of the constitution to all cases arising under it or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must

sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." 6 Wheat., 379, 380 (COURTS, §§ 734-45).

The principle of these cases is my guide in this. Sitting here, I shall always bow to such authority, and require no admonition to be influenced by any other, in a case where I am called on to take a part in the exercise of the judicial power over a sovereign state.

Guided by these principles, I come to consider the third clause of the second section of the first article of the constitution, which provides for the apportionment of representatives, and direct taxes "among the several states which may be included within this Union, according to their respective numbers, excluding Indians not taxed." This clause embraces not only the old but the new states to be formed out of the territory of the United States, pursuant to the resolutions and ordinances of the old congress and the conditions of the cession from the states, or which might arise by the division of the old. If the clause excluding Indians not taxed had not been inserted or should be stricken out, the whole free Indian population of all the states would be included in the federal numbers, co-extensively with the boundaries of all the states included in this Union. The insertion of this clause conveys a clear, definite declaration that there were no independent sovereign nations or states, foreign or domestic, within their boundaries, which should exclude them from the federal enumeration, or any bodies or communities within the states, excluded from the action of the federal constitution unless by the use of express words of exclusion.

The delegates who represented the states in the convention well knew the existing relations between the United States and the Indians, and put the constitution in a shape for adoption calculated to meet them; and the words used in this clause exclude the existence of the plaintiffs as a sovereign or foreign state or nation, within the meaning of this section, too plainly to require illustration or argument.

The third clause of the eighth article shows most distinctly the sense of the convention in authorizing congress to regulate commerce with the Indian tribes. The character of the Indian communities had been settled by many years of uniform usage under the old government; characterized by the name of nations, towns, villages, tribes, head-men and warriors, as the writers of resolutions or treaties might fancy; governed by no settled rule, and applying the word nation to the Catawbas as well as the Cherokees. The framers of the constitution have thought proper to define their meaning to be, that they were not foreign nations nor states of the Union, but Indian tribes; thus declaring the sense in which they should be considered under the constitution, which refers to them as tribes, only, in this clause. I cannot strike these words from the book; or construe Indian tribes in this part of the constitution to mean a sovereign state under the first clause of the second section of the third article. It would be taking very great liberty in the exposition of a fundamental law, to bring the Indians under the action of the legislative power as tribes, and of the judicial, as foreign states. The power conferred to regulate commerce with the Indian tribes is the same given to the old congress by the ninth article of the old confederation, "to regulate trade with the Indians." The raising the word "trade" to the dignity of commerce, regulating it with Indians or Indian tribes, is only a change of words. Mere phraseology cannot make Indians nations, or Indian tribes foreign states.

The second clause of the third section of the fourth article of the constitution is equally convincing. "The congress shall have power to dispose of and make all needful regulations and rules respecting the territory of the United States." What that territory was, the rights of soil, jurisdiction and sovereignty claimed and exercised by the states and the old congress, has been already seen. It extended to the formation of a government whose laws and process were in force within its whole extent, without a saving of Indian jurisdiction. It is the same power which was delegated to the old congress, and according to the judicial interpretation given by this court in *Gibbons v. Ogden*, 9 Wheat., 209 (Constr., §§ 1183-1201), the words "to regulate" implied in their nature full power over the thing to be regulated; they exclude, necessarily, the action of all others that would perform the same operation on the same thing. Applying this construction to commerce and territory leaves the jurisdiction and sovereignty of the Indian tribes wholly out of the question. The power given in this clause is of the most plenary kind. Rules and regulations respecting the territory of the United States; they necessarily include complete jurisdiction. It was necessary to confer it without limitation, to enable the new government to redeem the pledge given by the old in relation to the formation and powers of the new states. The saving of "the claims" of "any particular state" is almost a copy of a similar provision, part of the ninth article of the old confederation; thus delivering over to the new congress the power to regulate commerce with the Indian tribes, and regulate the territory they occupied, as the old had done from the beginning of the Revolution.

The only remaining clause of the constitution to be considered is the second clause in the sixth article. "All treaties made, or to be made, shall be the supreme law of the land."

In *Chirac v. Chirac*, this court declared that it was unnecessary to inquire into the effect of the treaty with France, in 1778 (8 Stats. at Large, 12), under the old confederation, because the confederation had yielded to our present constitution, and this treaty had been the supreme law of the land. 2 Wheat., 271. I consider the same rule as applicable to Indian treaties, whether considered as national compacts between sovereign powers, or as articles, agreements, contracts or stipulations on the part of this government, binding and pledging the faith of the nation to the faithful observance of its conditions. They secure to the Indians the enjoyment of the rights they stipulate to give or secure, to their full extent, and in the plenitude of good faith; but the treaties must be considered as the rules of reciprocal obligations. The Indians must have their rights; but must claim them in that capacity in which they received the grant or guaranty. They contracted by putting themselves under the protection of the United States, accepted of an allotment of hunting-grounds, surrendered and delegated to congress the exclusive regulation of their trade and the management of all their own affairs, taking no assurance of their continued sovereignty, if they had any before, but relying on the assurance of the United States that they might have full confidence in their justice respecting their interests; stipulating only for the right of sending a deputy of their own choice to congress. If, then, the Indians claim admission to this court under the treaty of Hopewell, they cannot be admitted as foreign states, and can be received in no other capacity.

The legislation of congress under the constitution in relation to the Indians has been in the same spirit and guided by the same principles which prevailed in the old congress and under the old confederation. In order to give full ef-

fect to the ordinance of 1787 in the northwest territory, it was adapted to the present constitution of the United States in 1789 (2 Laws U. S., 33; 1 Stats. at Large, 50), applied as the rule for its government to the territory south of the Ohio in 1790 (1 Stats. at Large, 123), except the sixth article (2 Laws U. S., 104); to the Mississippi territory in 1798 (3 Laws U. S., 39, 40; 1 Stats. at Large, 549), and with no exceptions to Indiana in 1800 (3 Laws U. S., 367; 2 Stats. at Large, 58), to Michigan in 1805 (3 Laws U. S., 632; 2 Stats. at Large, 309), to Illinois in 1809 (4 Laws U. S., 198; 2 Stats. at Large, 514).

In 1802 (2 Stats. at Large, 139), congress passed the act regulating trade and intercourse with the Indian tribes, in which they assert all the rights exercised over them under the old confederation, and do not alter in any degree their political relations (3 Laws U. S., 460 *et seq.*). In the same year Georgia ceded her lands west of her present boundary to the United States; and by the second article of the convention, the United States ceded to Georgia whatever claim, right or title they may have to the jurisdiction or soil of any lands south of Tennessee, North or South Carolina, and east of the line of the cession by Georgia. So that Georgia now has all the rights attached to her by her sovereignty within her limits, and which are saved to her by the second section of the fourth article of the constitution, and all the United States could cede either by their power over the territory or their treaties with the Cherokees.

§ 122. *Treaty of Holston in 1791.*

The treaty with the Cherokees, made at Holston in 1791, contains only one article which has a bearing on the political relations of the contracting parties. In the second article, the Cherokees stipulate "that the said Cherokee nation will not hold any treaty with any foreign power, individual state, or with individuals of any state." 1 Laws U. S., 326. This affords an instructive definition of the words nation and treaty. At the treaty of Hopewell, the Cherokees, though subdued and suing for peace, before divesting themselves of any of the rights or attributes of sovereignty which this government ever recognized them as possessing by the consummation of the treaty, contracted in the name of the head-men and warriors of all the Cherokees; but at Holston, in 1791, in abandoning their last remnant of political right, contracted as the Cherokee nation, thus ascending in title as they descended in power, and applying the word treaty to a contract with an individual. This consideration will divest words of their magic.

§ 123. *The existence of foreign states is only known judicially to the courts by the action of the other departments of the government.*

In thus testing the rights of the complainants as to their national character by the old confederation, resolutions, and ordinances of the old congress, the provisions of the constitution, treaties held under the authority of both, and the subsequent legislation thereon, I have followed the rule laid down for my guide by this court, in *Foster v. Elam*, 2 Pet., 307, in doing it "according to the principles established by the political department of the government." "If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. However individual judges may construe them (treaties), it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." That the existence of foreign states cannot be known to this court judicially, except by some act or recognition of the other departments of this government, is, I think, fully established in the *Case of Palmer*, 3 Wheat., 634, 635 (CRIMES, §§ 535-41); *The Pastora*, 4 Wheat., 63; and *The Anna*, 6 Wheat., 193.

I shall resort to the same high authority as the basis of my opinion on the powers of the state governments. "By the Revolution, the duties as well as the powers of government devolved on the people of [Georgia] New Hampshire. It is admitted that among the latter were comprehended the transcendent powers of parliament, as well as those of the executive department." *Dartmouth College v. Woodward*, 4 Wheat., 518 (Constr., §§ 2099–2117); *Green v. Biddle*, 8 Wheat., 98 (Constr., §§ 191–206); *Ogden v. Saunders*, 12 Wheat., 254 (Constr., §§ 1940–2003). "The same principle applies, though with no greater force, to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal regulations are to each other foreign." *Buckner v. Finley*, 2 Pet., 591 (BILLS AND NOTES, § 591). The powers of government which thus devolved on Georgia by the Revolution over her whole territory are unimpaired by any surrender of her territorial jurisdiction, by the old confederation or the new constitution, as there was in both an express saving, as well as by the tenth article of amendments.

But if any passed to the United States by either, they were retroceded by the convention of 1802. Her jurisdiction over the territory in question is as supreme as that of congress over what the nation has acquired by cession from the states, or treaties with foreign powers, combining the right of the state and general government. Within her boundaries there can be no other nation, community, or sovereign power, which this department can judicially recognize as a foreign state, capable of demanding or claiming our interposition, so as to enable them to exercise a jurisdiction incompatible with a sovereignty in Georgia, which has been recognized by the constitution, and every department of this government acting under its authority. Foreign states cannot be created by judicial construction; Indian sovereignty cannot be roused from its long slumber, and awakened to action by our fiat. I find no acknowledgment of it by the legislative or executive power. Till they have done so, I can stretch forth no arm for their relief without violating the constitution. I say this with great deference to those from whom I dissent; but my judgment tells me I have no power to act, and imperious duty compels me to stop at the portal, unless I can find some authority in the judgments of this court, to which I may surrender my own.

§ 124. *Indian rights to land are only rights of occupancy.*

Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government. 8 Wheat., 592. In *Fletcher v. Peck*, this court decided that the Indian occupancy was not absolutely repugnant to a seizin in fee in Georgia, that she had good right to grant land so occupied, that it was within the state, and could be held by purchasers under a law subject only to extinguishment of the Indian title. 6 Cranch, 88, 142 (Constr., §§ 1805–12); 9 Cranch, 11. In the case of *Johnson v. McIntosh*, 8 Wheat., 543, 571, the nature of the Indian title to land on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that from the time of discovery under the royal government, the colonies, the states, the confederacy and this Union, their tenure was the same occupancy, their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction, and sovereignty was in the government, subject only to such rights; that grants vested soil

and dominion, and the powers of government, whether the land granted was vacant or occupied by Indians.

By the treaty of peace (8 Stats. at Large, 80) the powers of government and the rights of soil which had previously been in Great Britain passed definitively to these states. 8 Wheat., 584. They asserted these rights, and ceded soil and jurisdiction to the United States. The Indians were considered as tribes of fierce savages; a people with whom it was impossible to mix, and who could not be governed as a distinct society. They are not named or referred to in any part of the opinion of the court as nations or states, and nowhere declared to have any national capacity or attributes of sovereignty in their relations to the general or state governments. The principles established in this case have been supposed to apply to the rights which the nations of Europe claimed to acquire by discovery, as only relative between themselves, and that they did not assume thereby any rights of soil or jurisdiction over the territory in the actual occupation of the Indians. But the language of the court is too explicit to be misunderstood. "This principle was, that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Those relations which were to subsist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian rights of occupancy. The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. 8 Wheat., 574.

I feel it my duty to apply them to this case. They are in perfect accordance with those on which the governments of the united and individual states have acted in all their changes; they were asserted and maintained by the colonies before they assumed independence. While dependent themselves on the crown, they exercised all the rights of dominion and sovereignty over the territory occupied by the Indians; and this is the first assertion by them of rights as a foreign state within the limits of a state. If their jurisdiction within their boundaries has been unquestioned until this controversy; if rights have been exercised which are directly repugnant to those now claimed, the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government has acted for fifty-five years, and force by mere judicial power upon the other departments of this government and the states of this Union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto

unknown, unacknowledged by any department of the government, denied by all through all time, unclaimed till now, and now declared to have been called into exercise, not by any change in our constitution, the laws of the Union or the states, but pre-existent and paramount over the supreme law of the land.

I disclaim the assumption of a judicial power so awfully responsible. No assurance or certainty of support in public opinion can induce me to disregard a law so supreme, so plain to my judgment and reason. Those who have brought public opinion to bear on this subject act under a mere moral responsibility, under no oath which binds their movements to the straight and narrow line drawn by the constitution. Politics or philanthropy may impel them to pass it, but when their objects can be effectuated only by this court, they must not expect its members to diverge from it, when they cannot conscientiously take the first step without breaking all the high obligations under which they administer the judicial power of the constitution. The account of my executorship cannot be settled before the court of public opinion or any human tribunal. None can release the balance which will accrue by the violation of my solemn conviction of duty.

Dissenting opinion by MR. JUSTICE THOMPSON.

Entertaining different views of the questions now before us in this case, and having arrived at a conclusion different from that of a majority of the court, and considering the importance of the case and the constitutional principle involved in it, I shall proceed, with all due respect for the opinion of others, to assign the reasons upon which my own has been formed.

In the opinion pronounced by the court, the merits of the controversy between the state of Georgia and the Cherokee Indians have not been taken into consideration. The denial of the application for an injunction has been placed solely on the ground of want of jurisdiction in this court to grant the relief prayed for. It became, therefore, unnecessary to inquire into the merits of the case. But thinking as I do that the court has jurisdiction of the case, and may grant relief, at least in part, it may become necessary for me, in the course of my opinion, to glance at the merits of the controversy, which I shall, however, do very briefly, as it is important so far as relates to the present application.

§ 125. *The supreme court has no jurisdiction of matters implying political power.*

Before entering upon the examination of the particular points which have been made and argued, and for the purpose of guarding against any erroneous conclusions, it is proper that I should state that I do not claim for this court the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed by the bill may be beyond the reach of this court. Much of the matter therein contained, by way of complaint, would seem to depend for relief upon the exercise of political power, and as such, appropriately devolving upon the executive and not the judicial department of the government. This court can grant relief so far only as the rights of person or property are drawn in question and have been infringed.

It would very ill become the judicial station which I hold, to indulge in any remarks upon the hardship of the cause, or the great injustice that would seem to have been done to the complainants, according to the statements in the bill, and which, for the purpose of the present motion, I must assume to be true. If they are entitled to other than judicial relief, it cannot be admitted



that, in a government like ours, redress is not to be had in some of its departments, and the responsibility for its denial must rest upon those who have the power to grant it. But believing, as I do, that relief to some extent falls properly under judicial cognizance, I shall proceed to the examination of the case under the following heads:

1. Is the Cherokee nation of Indians a competent party to sue in this court?
2. Is a sufficient case made out in the bill to warrant this court in granting any relief?
3. Is an injunction the fit and appropriate relief?

§ 126. *The Cherokee nation of Indians is a competent party to sue in the supreme court.*

1. By the constitution of the United States it is declared (art. 3, § 2) that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority, etc., to controversies between two or more states, etc., and between a state or the citizens thereof, and foreign states, citizens or subjects.

The controversy in the present case is alleged to be between a foreign state and one of the states of the Union, and does not, therefore, come within the eleventh amendment of the constitution, which declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. This amendment does not, therefore, extend to suits prosecuted against one of the United States by a foreign state. The constitution further provides, that, in all cases where a state shall be a party, the supreme court shall have original jurisdiction. Under these provisions in the constitution, the complainants have filed their bill in this court, in the character of a foreign state, against the state of Georgia, praying an injunction to restrain that state from committing various alleged violations of the property of the nation, claimed under the laws of the United States, and treaties made with the Cherokee nation.

§ 127. *A state of the Union may be sued by a foreign state.*

That a state of this Union may be sued by a foreign state, when a proper case exists and is presented, is too plainly and expressly declared in the constitution to admit of doubt; and the first inquiry is, whether the Cherokee nation is a foreign state within the sense and meaning of the constitution.

§ 128. *A state or nation that governs itself by its own laws is a sovereign state although it may be weak, feudatory or tributary. The Cherokee nation of Indians is such a state.*

The terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing, and imply a body of men united together to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states, are to be considered as so many free persons, living together in a state of nature. Vattel, 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a

natural society under the law of nations. It is sufficient if it be really sovereign and independent; that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but, whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority is left in the administration of the state. Vattel, ch. 1, pp. 16, 17.

Testing the character and condition of the Cherokee Indians by these rules, it is not perceived how it is possible to escape the conclusion that they form a sovereign state. They have always been dealt with as such by the government of the United States, both before and since the adoption of the present constitution. They have been admitted and treated as a people governed solely and exclusively by their own laws, usages and customs within their own territory, claiming and exercising exclusive dominion over the same, yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self-government over what remained unsold. And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people. And, indeed, I do not understand it is denied by a majority of the court, that the Cherokee Indians form a sovereign state, according to the doctrine of the law of nations, but that, although a sovereign state, they are not considered a foreign state within the meaning of the constitution.

Whether the Cherokee Indians are to be considered a foreign state or not is a point on which we cannot expect to discover much light from the law of nations. We must derive this knowledge chiefly from the practice of our own government, and the light in which the nation has been viewed and treated by it.

That numerous tribes of Indians, and among others the Cherokee nation, occupied many parts of this country long before the discovery by Europeans, is abundantly established by history; and it is not denied but that the Cherokee nation occupied the territory now claimed by them long before that period. It does not fall within the scope and object of the present inquiry to go into a critical examination of the nature and extent of the rights growing out of such occupancy, or the justice and humanity with which the Indians have been treated or their rights respected.

That they are entitled to such occupancy, so long as they choose quietly and peaceably to remain upon the land, cannot be questioned. The circumstance of their original occupancy is here referred to, merely for the purpose of showing that if these Indian communities were then, as they certainly were, nations, they must have been foreign nations to all the world, not having any connection, or alliance of any description, with any other power on earth. And if the Cherokees were then a foreign nation, when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?

§ 129. *The Indian occupancy and self-government are matters of right, not of indulgence.*

They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self-government, and become subject to the laws of the conqueror. Whenever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character. And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves, the right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usages and customs, and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent, or unless a just and necessary war should sanction their dispossession.

In this view of their situation, there is as full and complete recognition of their sovereignty as if they were the absolute owners of the soil. The progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character, so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their foreign character, and in that sense must the term foreign be understood as used in the constitution. It can have no relation to local, geographical or territorial position. It cannot mean a country beyond sea. Mexico or Canada is certainly to be considered a foreign country, in reference to the United States. It is the political relation in which one government or country stands to another which constitutes it foreign to the other. The Cherokee territory, being within the chartered limits of Georgia, does not affect the question. When Georgia is spoken of as a state, reference is had to its political character, and not to boundary; and it is not perceived that any absurdity or inconsistency grows out of the circumstance that the jurisdiction and territory of the state of Georgia surround or extend on every side of the Cherokee territory. It may be inconvenient to the state, and very desirable, that the Cherokees should be removed, but it does not at all affect the political relation between Georgia and those Indians. Suppose the Cherokee territory had been occupied by Spaniards or any other civilized people, instead of Indians, and they had from time to time ceded to the United States portions of their lands, precisely in the same manner as the Indians have done, and in like manner retained and occupied the part now held by the Cherokees, and having a regular government established there; would it not only be considered a separate and distinct nation or state, but a foreign nation, with reference to the state of Georgia or the United States? If we look to lexicographers, as well as approved writers, for the use of the term foreign, it may be applied with the strictest propriety to the Cherokee nation.

In a general sense, it is applied to any person or thing belonging to another nation or country. We call an alien a foreigner, because he is not of the country in which we reside. In a political sense, we call every country for-

eign which is not within the jurisdiction of the same government. In this sense, Scotland before the union was foreign to England; and Canada and Mexico foreign to the United States. In the United States, all transatlantic countries are foreign to us. But this is not the only sense in which it is used.

It is applied with equal propriety to an adjacent territory, as to one more remote. Canada or Mexico is as much foreign to us as England or Spain. And it may be laid down as a general rule, that, when used in relation to countries in a political sense, it refers to the jurisdiction or government of the country. In a commercial sense, we call all goods coming from any country not within our own jurisdiction, foreign goods.

In the diplomatic use of the term, we call every minister a foreign minister who comes from another jurisdiction or government. And this is the sense in which it is judically used by this court, even as between the different states of this Union. In the case of *Buckner v. Finley*, 2 Pet., 590 (BILLS AND NOTES, § 941), it was held that a bill of exchange drawn in one state of the Union, on a person living in another state, was a foreign bill, and to be treated as such in the courts of the United States. The court says that, in applying the definition of a foreign bill to the political character of the several states of this Union, in relation to each other, we are all clearly of opinion that bills drawn in one of these states upon persons living in another of them partake of the character of foreign bills, and ought to be so treated. That for all national purposes embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to and independent of each other, their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. So in the case of *Warder v. Arrell*, decided in the court of appeals of Virginia. 2 Wash., 298. The court, in speaking of foreign contracts, and saying that the laws of the foreign country where the contract was made must govern, add: "The same principle applies, though with no greater force, to the different states of America; for, though they form a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign."

It is manifest from these cases that a foreign state, judicially considered, consists in its being under a different jurisdiction or government, without any reference to its territorial position. This is the marked distinction, particularly in the case of *Buckner v. Finley*. So far as these states are subject to the laws of the Union, they are not foreign to each other. But so far as they are subject to their own respective state laws and government, they are foreign to each other. And if, as here decided, a separate and distinct jurisdiction or government is the test by which to decide whether a nation be foreign or not, I am unable to perceive any sound and substantial reason why the Cherokee nation should not be so considered. It is governed by its own laws, usages and customs; it has no connection with any other government or jurisdiction, except by way of treaties entered into with like form and ceremony as with other foreign nations. And this seems to be the view taken of them by Mr. Justice Johnson, in the case of *Fletcher v. Peck*, 6 Cranch, 146; 2 Pet. Cond. Rep., 308 (CONST., §§ 1805-18).

In speaking of the state and condition of the different Indian nations, he observes "that some have totally extinguished their national fire, and submitted themselves to the laws of the states; others have by treaty acknowl-

edged that they hold their national existence at the will of the state within which they reside; others retain a limited sovereignty, and the absolute proprietorship of the soil. The latter is the case of the tribes to the west of Georgia, among which are the Cherokees. We legislate upon the conduct of strangers or citizens within their limits; but innumerable treaties formed with them acknowledge them to be an independent people; and the uniform practice of acknowledging their right of soil by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their rights of soil."

Although there are many cases in which one of these United States has been sued by another, I am not aware of any instance in which one of the United States has been sued by a foreign state. But no doubt can be entertained that such an action might be sustained upon a proper case being presented. It is expressly provided for in the constitution, and this provision is certainly not to be rejected as entirely nugatory.

§ 130. *Treaties between the United States and Indian tribes are contracts founded on valuable considerations.*

Suppose a state, with the consent of congress, should enter into an agreement with a foreign power (as might undoubtedly be done: Constitution, art. 1, § 10) for a loan of money; would not an action be sustained in this court to enforce payment thereof? Or suppose the state of Georgia, with the consent of congress, should purchase the right of the Cherokee Indians to this territory, and enter into a contract for the payment of the purchase money, could there be a doubt that an action could be sustained upon such a contract? No objection would certainly be made for want of competency in that nation to make a valid contract. The numerous treaties entered into with the nation would be a conclusive answer to any such objection. And if an action could be sustained in such case, it must be under that provision in the constitution which gives jurisdiction to this court in controversies between a state and a foreign state. For the Cherokee nation is certainly not one of the United States.

And what possible objection can lie to the right of the complainants to sustain an action? The treaties made with this nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory. And if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny to them the right and the power to enforce such a contract. And where the right secured by such treaty forms a proper subject for judicial cognizance, I can perceive no reason why this court has not jurisdiction of the case. The constitution expressly gives to the court jurisdiction in all cases of law and equity arising under treaties made with the United States. No suit will lie against the United States upon such treaty, because no possible case can exist where the United States can be sued. But not so with respect to a state; and if any right secured by treaty has been violated by a state in a case proper for judicial inquiry, no good reason is perceived why an action may not be sustained for violation of a right secured by treaty, as well as by contract under any other form. The judiciary is certainly not the department of the government authorized to enforce all rights that may be recognized and secured by treaty. In many instances, these are mere political rights with which the judiciary cannot deal. But

when the question relates to a mere right of property, and a proper case can be made between competent parties, it forms a proper subject for judicial inquiry.

It is a rule which has been repeatedly sanctioned by this court, that the judicial department is to consider as sovereign and independent states or nations those powers that are recognized as such by the executive and legislative departments of the government, they being more particularly intrusted with our foreign relations. 4 Cranch, 241; 2 Pet., 98; 3 Wheat., 634; 4 id., 64.

If we look to the whole course of treatment by this country of the Indians, from the year 1775 to the present day, when dealing with them in their aggregate capacity as nations or tribes, and regarding the mode and manner in which all negotiations have been carried on and concluded with them, the conclusion appears to me irresistible, that they have been regarded by the executive and legislative branches of the government not only as sovereign and independent, but as foreign nations or tribes, not within the jurisdiction nor under the government of the states within which they were located. This remark is to be understood, of course, as referring only to such as live together as a distinct community, under their own laws, usages and customs, and not to the mere remnant of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country; their national character extinguished, and their usages and customs in a great measure abandoned, self-government surrendered, and who have voluntarily, or by the force of circumstances which surrounded them, gradually become subject to the laws of the states within which they are situated.

Such, however, is not the case with the Cherokee nation. It retains its usages and customs and self-government, greatly improved by the civilization which it has been the policy of the United States to encourage and foster among them. All negotiations carried on with the Cherokees and other Indian nations have been by way of treaty, with all the formality attending the making of treaties with any foreign power. The journals of congress, from the year 1775 down to the adoption of the present constitution, abundantly establish this fact; and, since that period, such negotiations have been carried on by the treaty-making power, and uniformly under the denomination of treaties.

§ 131. *A treaty defined.*

What is a treaty, as understood in the law of nations? It is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties. And where is the authority, either in the constitution or in the practice of the government, for making any distinction between treaties made with the Indian nations and any other foreign power? They relate to peace and war, the surrender of prisoners, the cession of territory and the various subjects which are usually embraced in such contracts between sovereign nations.

A recurrence to the various treaties made with the Indian nations and tribes in different parts of the country will fully illustrate this view of the relation in which our government has considered the Indians as standing. It will be sufficient, however, to notice a few of the many treaties made with this Cherokee nation.

By the treaty of Hopewell, of the 28th November, 1785 (1 Laws of United States, 322), mutual stipulations are entered into to restore all prisoners taken

by either party; and the Cherokees stipulate to restore all negroes, and all other property taken from the citizens of the United States; and a boundary line is settled between the Cherokees and the citizens of the United States, and this embraced territory within the chartered limits of Georgia. And by the sixth article it is provided that if any Indian, or person residing among them, or who shall take refuge in their nation, shall commit a robbery or murder, or other capital crime, on any citizen of the United States, or person under their protection, the nation or tribe to which such offender may belong shall deliver him up to be punished, according to the ordinances of the United States. What more explicit recognition of the sovereignty and independence of this nation could have been made? It was a direct acknowledgment that this territory was under a foreign jurisdiction. If it had been understood that the jurisdiction of the state of Georgia extended over this territory, no such stipulation would have been necessary. The process of the courts of Georgia would have run into this as well as into any other part of the state. It is a stipulation analogous to that contained in the treaty of 1794 (8 Stat. at Large, 116) with England (1 Laws of United States, 220), by the twenty-seventh article of which it is mutually agreed that each party will deliver up to justice all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other. Upon what ground can any distinction be made as to the reason and necessity of such stipulation in the respective treaties? The necessity for the stipulation, in both cases, must be because the process of one government and jurisdiction will not run into that of another; and separate and distinct jurisdiction, as has been shown, is what makes governments and nations foreign to each other in their political relations.

The same stipulation, as to delivering up criminals who shall take refuge in the Cherokee nation, is contained in the treaty of Holston, of the 2d of July, 1791. 1 Laws of United States, 327. And the eleventh article fully recognizes the jurisdiction of the Cherokee nation over the territory occupied by them. It provides that if any citizen of the United States shall go into the territory belonging to the Cherokees, and commit any crime upon or trespass against the person or property of any friendly Indian, which, if committed within the jurisdiction of any state, would be punishable by the laws of such state, he shall be subject to the same punishment, and proceeded against in the same manner, as if the offense had been committed within the jurisdiction of the state. Here is an explicit admission that the Cherokee territory is not within the jurisdiction of any state. If it had been considered within the jurisdiction of Georgia, such a provision would not only be unnecessary but absurd. It is a provision looking to the punishment of a citizen of the United States for some act done in a foreign country. If exercising exclusive jurisdiction over a country is sufficient to constitute the state or power so exercising it a foreign state, the Cherokee nation may assuredly, with the greatest propriety, be so considered.

§ 132. *The clause of the constitution authorizing congress to regulate commerce with the Indian tribes does not fairly imply that they are not foreign nations.*

The phraseology of the clause in the constitution giving to congress the power to regulate commerce is supposed to afford an argument against considering the Cherokees a foreign nation. The clause reads thus: "To regulate

commerce with foreign nations, and among the several states, and with the Indian tribes." Constitution, art. 1, § 8. The argument is, that if the Indian tribes are foreign nations, they would have been included without being specially named, and being so named imports something different from the previous term, "foreign nations."

This appears to me to partake too much of a mere verbal criticism, to draw after it the important conclusion that the Indian tribes are not foreign nations. But the clause affords, irresistibly, the conclusion that the Indian tribes are not there understood as included within the description of the "several states," or there could have been no fitness in immediately thereafter particularizing "the Indian tribes."

It is generally understood that every separate body of Indians is divided into bands or tribes, and forms a little community within the nation to which it belongs; and as the nation has some particular symbol by which it is distinguished from others, so each tribe has a badge from which it is denominated, and each tribe may have rights applicable to itself.

Cases may arise where the trade with a particular tribe may require to be regulated, and which might not have been embraced under the general description of the term nation, or it might, at least, have left the case somewhat doubtful. As the clause was intended to vest in congress the power to regulate all commercial intercourse, this phraseology was probably adopted to meet all possible cases, and the provision would have been imperfect if the term Indian tribes had been omitted.

Congress could not then have regulated the trade with any particular tribe that did not extend to the whole nation. Or it may be that the term tribe is here used as importing the same thing as that of nation, and adopted merely to avoid the repetition of the term nation; and the Indians are specially named, because there was a provision somewhat analogous in the confederation; and entirely omitting to name the Indian tribes might have afforded some plausible grounds for concluding that this branch of commercial intercourse was not subject to the power of congress.

On examining the journals of the old congress, which contain numerous proceedings and resolutions respecting the Indians, the terms "nation" and "tribe" are frequently used indiscriminately, and as importing the same thing; and treaties were sometimes entered into with the Indians, under the description or denomination of tribes, without naming the nation. See Journals 30th June and 12th July, 1775; 8th March, 1776; 20th October, 1777, and numerous other instances.

But whether any of these suggestions will satisfactorily account for the phraseology here used or not, it appears to me to be of too doubtful import to outweigh the considerations to which I have referred to show that the Cherokees are a foreign nation. The difference between the provision in the constitution and that in the confederation on this subject appears to me to show very satisfactorily, that, so far as related to trade and commerce with the Indians wherever found in tribes, whether within or without the limits of a state, was subject to the regulation of congress.

The provision in the confederation (art. 9, 1 Laws United States, 17) is, that congress shall have the power of regulating the trade and management of all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated. The true import of this provision is certainly not very obvious. See *Federalist*,



No. 42. What were the legislative rights intended to be embraced within the proviso is left in great uncertainty. But whatever difficulty on that subject might have arisen under the confederation, it is entirely removed by the omission of the proviso in the present constitution, thereby leaving this power entirely with congress, without regard to any state right on the subject, and showing that the Indian tribes were considered as distinct communities although within the limits of a state.

The provision as contained in the confederation may aid in illustrating what is to be inferred from some parts of the constitution, article 1, section 1, part 3, as to the apportionment of representatives, and acts of congress in relation to the Indians, to wit, that they are divided into two distinct classes. One composed of those who are considered members of the state within which they reside, and the other not: the former embracing the remnant of the tribes who had lost their distinctive character as a separate community, and had become subject to the laws of the states; and the latter such as still retained their original connection as tribes, and live together under their own laws, usages and customs, and as such are treated as a community independent of the state. No very important conclusion, I think, therefore, can be drawn from the use of the term "tribe" in this clause of the constitution, intended merely for commercial regulations. If considered as importing the same thing as the term "nation," it might have been adopted to avoid the repetition of the word nation.

Other instances occur in the constitution where different terms are used importing the same thing. Thus, in the clause giving jurisdiction to this court, the term "foreign states" is used instead of "foreign nations," as in the clause relating to commerce. And again, in article 1, section 10, a still different phraseology is employed. "No state, without the consent of congress, shall enter into any agreement or compact with a 'foreign power.'" But each of these terms, nation, state, power, as used in different parts of the constitution, imports the same thing, and does not admit of a different interpretation. In the treaties made with the Indians, they are sometimes designated under the name of tribe, and sometimes that of nation. In the treaty of 1804 (7 Stats. at Large, 81) with the Delaware Indians, they are denominated the "Delaware tribe of Indians." 1 Laws U. S., 305. And in a previous treaty with the same people, in the year 1778 (7 Stats. at Large, 13), they are designated by the name of "the Delaware nation." 1 Laws U. S., 302.

As this was one of the earliest treaties made with the Indians, its provisions may serve to show in what light the Indian nations were viewed by congress at that day.

The territory of the Delaware nation was within the limits of the states of New York, Pennsylvania and New Jersey. Yet we hear of no claim of jurisdiction set up by those states over these Indians. This treaty, both in form and substance, purports to be an arrangement with an independent sovereign power. It even purports to be articles of confederation. It contains stipulations relative to peace and war, and for permission to the United States troops to pass through the country of the Delaware nation. That neither party shall protect, in their respective states, servants, slaves or criminals, fugitives from the other; but secure and deliver them up. Trade is regulated between the parties. And the sixth article shows the early pledge of the United States to protect the Indians in their possessions, against any claims or encroachments of the states. It recites that whereas the enemies of the United States have

endeavored to impress the Indians in general with an opinion that it is the design of the states to extirpate the Indians, and take possession of their country, to obviate such false suggestions the United States do engage to guaranty to the aforesaid nation of Delawares and their heirs, all their territorial rights in the fullest and most ample manner, as it has been bounded by former treaties, etc. And provision is even made for inviting other tribes to join the confederacy, and to form a state, and have a representation in congress, should it be found conducive to the mutual interest of both parties. All which provisions are totally inconsistent with the idea of these Indians being considered under the jurisdiction of the states, although their chartered limits might extend over them.

The recital in this treaty contains a declaration and admission of congress of the rights of Indians in general, and that the impression which our enemies were endeavoring to make, that it was the design of the states to extirpate them and take their lands, was false. And the same recognition of their rights runs through all the treaties made with the Indian nations or tribes, from that day down to the present time.

The twelfth article of the treaty of Hopewell contains a full recognition of the sovereign and independent character of the Cherokee nation. To impress upon them full confidence in the justice of the United States respecting their interest, they have a right to send a deputy of their choice to congress. No one can suppose that such deputy was to take his seat as a member of congress, but that he would be received as the agent of that nation. It is immaterial what such agent is called, whether minister, commissioner or deputy; he is to represent his principal.

There could have been no fitness or propriety in any such stipulation, if the Cherokee nation had been considered in any way incorporated with the state of Georgia, or as citizens of that state. The idea of the Cherokees being considered citizens is entirely inconsistent with several of our treaties with them. By the eighth article of the treaty of the 26th December, 1817 (7 Stats. at Large, 156; 6 Laws U. S., 706), the United States stipulate to give six hundred and forty acres of land to each head of any Indian family residing on the lands now ceded, or which may hereafter be surrendered to the United States, who may wish to become citizens of the United States; so also the second article of the treaty with the same nation, of the 10th of March, 1819 (7 Stats. at Large, 195), contains the same stipulation in favor of the heads of families, who may choose to become citizens of the United States; thereby clearly showing that they were not considered citizens at the time those stipulations were entered into, or the provision would have been entirely unnecessary if not absurd. And if not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the nation. And it was, therefore, very aptly asked on the argument, and I think not very easily answered, how a nation composed of aliens or foreigners can be other than a foreign nation.

The question touching the citizenship of an Oneida Indian came under the consideration of the supreme court of New York in the case of *Jackson v. Goodel*, 20 Johns., 193. The lessor of the plaintiff was the son of an Oneida Indian, who had received a patent for the lands in question, as an officer in the revolutionary war; and although the supreme court, under the circumstances of the case, decided he was a citizen, yet Chief Justice Spencer observed: we do not mean to say that the condition of the Indian tribes (alluding to the

six nations), at former and remote periods, has been that of subjects or citizens of the state; their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon and subject to our government. But the cause being carried up to the court of errors, Chancellor Kent, in a very elaborate and able opinion on that question, came to a different conclusion as to the citizenship of the Indian, even under the strong circumstances of that case.

"The Oneidas," he observed, "and the tribes composing the six nations of Indians, were originally free and independent nations, and it is for the counsel who contend that they have now ceased to be a distinct people and become completely incorporated with us, to point out the time when that event took place. In my view, they have never been regarded as citizens, or members of our body politic. They have always been and still are considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection and subject to our coercion, so far as the public safety required it, and no further. The whites have been gradually pressing upon them, as they kept receding from the approaches of civilization. We have purchased the greater part of their lands, destroyed their hunting-grounds, subdued the wilderness around them, overwhelmed them with our population, and gradually abridged their native independence. Still, they are permitted to exist as distinct nations, and we continue to treat with their sachems in a national capacity, and as being the lawful representatives of their tribes. Through the whole course of our colonial history, these Indians were considered dependent allies. The colonial authorities uniformly negotiated with them, and made and observed treaties with them as sovereign communities exercising the right of free deliberation and action; but, in consideration of protection, owing a qualified subjection in a national capacity to the British crown. No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and their lands under the protection of the British crown; such a fact is of frequent occurrence between independent nations. One community may be bound to another by a very unequal alliance, and still be a sovereign state. *Vat., B. 1, ch. 16, § 194.* The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes. There is nothing in the proceedings of the United States during the revolutionary war which went to impair and much less to extinguish the national character of the six nations, and consolidate them with our own people. Every public document speaks a different language, and admits their distinct existence and competence as nations, but placed in the same state of dependence, and calling for the same protection which existed before the war. In the treaties made with them, we have the forms and requisites peculiar to the intercourse between friendly and independent states; and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require of existing and acknowledged sovereignty?"

If this be a just view of the Oneida Indians, the rules and principles here applied to that nation may with much greater force be applied to the character, state and condition of the Cherokee nation of Indians; and we may safely conclude that they are not citizens, and must of course be aliens; and, if aliens in their individual capacities, it will be difficult to escape the conclusion that, as a community, they constitute a foreign nation or state, and thereby become

a competent party to maintain an action in this court, according to the express terms of the constitution.

And why should this court scruple to consider this nation a competent party to appear here? Other departments of the government, whose right it is to decide what powers shall be recognized as sovereign and independent nations, have treated this nation as such. They have considered it competent, in its political and national capacity, to enter into contracts of the most solemn character; and if these contracts contain matter proper for judicial inquiry, why should we refuse to entertain jurisdiction of the case? Such jurisdiction is expressly given to this court in cases arising under treaties. If the executive department does not think proper to enter into treaties or contracts with the Indian nations, no case with them can arise calling for judicial cognizance. But when such treaties are found containing stipulations proper for judicial cognizance, I am unable to discover any reason satisfying my mind that this court has not jurisdiction of the case.

§ 133. *The Cherokee nation being competent to sue in the supreme court of the United States is entitled to relief by injunction against violations of rights secured by treaty with the United States.*

The next inquiry is, whether such a case is made out in the bill as to warrant this court in granting any relief. I have endeavored to show that the Cherokee nation is a foreign state, and, as such, a competent party to maintain an original suit in this court against one of the United States. The injuries complained of are violations committed and threatened upon the property of the complainants, secured to them by the laws and treaties of the United States. Under the constitution, the judicial power of the United States extends expressly to all cases in law and equity arising under the laws of the United States, and treaties made, or which shall be made, under the authority of the same.

In the case of *Osborn v. The United States Bank*, 9 Wheat., 819 (Constr., §§ 2363-87), the court say that this clause in the constitution enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form presented by law. It then becomes a case, and the constitution authorizes the application of the judicial power.

The question presented in the present case is, under the ordinary form of judicial proceedings, to obtain an injunction to prevent or stay a violation of the rights of property claimed and held by the complainants, under the treaties and laws of the United States, which, it is alleged, have been violated by the state of Georgia. Both the form and the subject-matter of the complaint, therefore, fall properly under judicial cognizance.

What the rights of property in the Cherokee nation are may be discovered from the several treaties which have been made between the United States and that nation between the years 1785 and 1819. It will be unnecessary to notice many of them. They all recognize, in the most unqualified manner, a right of property in this nation, to the occupancy, at least, of the lands in question. It is immaterial whether this interest is a mere right of occupancy, or an absolute right to the soil. The complaint is for a violation, or threatened violation, of the possessory right. And this is a right, in the enjoyment of

which they are entitled to protection, according to the doctrine of this court in the cases of *Fletcher v. Peck*, 6 Cranch, 87 (Const., §§ 1805-12); 2 Pet., 308, and *Johnson v. McIntosh*, 8 Wheat., 592. By the fourth article of the treaty of Hopewell, as early as the year 1785 (1 Laws U. S., 323), the boundary line between the Cherokees and the citizens of the United States within the limits of the United States is fixed.

The fifth article provides for the removal and punishment of citizens of the United States or other persons, not being Indians, who shall attempt to settle on the lands so allotted to the Indians, thereby not only surrendering the exclusive possession of these lands to this nation, but providing for the protection and enjoyment of such possession. And, it may be remarked, in corroboration of what has been said in a former part of this opinion, that there is here drawn a marked line of distinction between the Indians and citizens of the United States, entirely excluding the former from the character of citizens.

Again, by the treaty of Holston, in 1791 (1 Laws United States, 325), the United States purchase a part of the territory of this nation, and a new boundary line is designated, and provision made for having it ascertained and marked. The mere act of purchasing and paying a consideration for these lands is a recognition of the Indian right. In addition to which, the United States, by the seventh article, solemnly guaranty to the Cherokee nation all their lands not ceded by that treaty. And by the eighth article it is declared that any citizens of the United States who shall settle upon any of the Cherokee land shall forfeit the protection of the United States; and the Cherokees may punish them or not as they shall please. This treaty was made soon after the adoption of the present constitution. And in the last article, it is declared that it shall take effect, and be obligatory upon the contracting parties, as soon as the same shall have been ratified by the president of the United States, with the advice and consent of the senate, thereby showing the early opinion of the government of the character of the Cherokee nation. The contract is made by way of treaty, and to be ratified in the same manner as all other treaties made with sovereign and independent nations, and which has been the mode of negotiating in all subsequent Indian treaties.

§ 134. *The United States by treaty guarantied the possession of their lands to the Cherokee Indians against intruding citizens of the United States and others.*

And this course was adopted by President Washington, upon great consideration, by and with the previous advice and concurrence of the senate. In his message sent to the senate on that occasion, he states that the white people had intruded on the Indian lands, as bounded by the treaty of Hopewell, and declares his determination to execute the power intrusted to him by the constitution, to carry that treaty into faithful execution, unless a new boundary should be arranged with the Cherokees, embracing the intrusive settlements, and compensating the Cherokees therefor. And he puts to the senate this question: Shall the United States stipulate solemnly to guaranty the new boundary which shall be arranged? Upon which the senate resolve, that in case a new or other boundary than that stipulated by the treaty of Hopewell shall be concluded with the Cherokee Indians, the senate do advise and consent solemnly to guaranty the same. 1 Executive Journal, 60. In consequence of which the treaty of Holston was entered into, containing the guaranty.

Further cessions of land have been made at different times by the Cherokee

nation to the United States, for a consideration paid therefor; and, as the treaties declare, in acknowledgment for the protection of the United States (see treaty of 1798, 1 Laws U. S., 332; 7 Stats. at Large, 62), the United States always recognizing, in the fullest manner, the Indian right of possession; and in the treaty of the 8th of July, 1817 (7 Stats. at Large, 156), article 5 (6 Laws U. S., 702), all former treaties are declared to be in full force, and the sanction of the United States is given to the proposition of a portion of the nation to begin the establishment of fixed laws and a regular government, thereby recognizing in the nation a political existence, capable of forming an independent government, separate and distinct from and in no manner whatever under the jurisdiction of the state of Georgia, and no objection is known to have been made by that state.

And again, in 1819 (7 Stats. at Large, 195; 6 Laws U. S., 748), another treaty is made, sanctioning and carrying into effect the measures contemplated by the treaty of 1817, beginning with a recital that the greater part of the Cherokees have expressed an earnest desire to remain on this side of the Mississippi; and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, of the 8th of July, 1817, might without further delay be finally adjusted, have offered to make a further cession of land, etc. This cession is accepted, and various stipulations entered into, with a view to their civilization and the establishment of a regular government, which has since been accomplished. And by the fifth article it is stipulated that all white people who have intruded or who shall thereafter intrude on the lands reserved for the Cherokees shall be removed by the United States, and proceeded against according to the provisions of the act of 1802, entitled "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers." 3 Laws U. S., 460. By this act the boundary lines, established by treaty with the various Indian tribes, are required to be ascertained and marked; and among others, that with the Cherokee nation, according to the treaty of the 2d of October, 1798. 7 Stats. at Large, 62.

It may be necessary here briefly to notice some of the provisions of this act of 1802, so far as it goes to protect the rights of property in the Indians, for the purpose of seeing whether there has been any violation of those rights by the state of Georgia, which falls properly under judicial cognizance. By this act it is made an offense punishable by fine and imprisonment, for any citizen or other person resident in the United States, or either of the territorial districts, to cross over or go within the boundary line to hunt or destroy the game, or drive stock to range or feed on the Indian lands, or to go into any country allotted to the Indians without a passport, or to commit therein any robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian which would be punishable if committed within the jurisdiction of any state against a citizen of the United States, thereby necessarily implying that the Indian territory secured by treaty was not within the jurisdiction of any state. The act further provides that when property is taken or destroyed, the offender shall forfeit and pay twice the value of the property so taken or destroyed. And by the fifth section (2 Stats. at Large, 141), it is declared that if any citizen of the United States, or other person, shall make a settlement on any lands belonging or secured, or guaranteed, by treaty with the United States, to any Indian tribe, or shall survey or attempt to survey such lands, or designate any of the boundaries, by marking trees or otherwise,

such offender shall forfeit a sum not exceeding \$1,000, and suffer imprisonment not exceeding twelve months.

This act contains various other provisions for the purpose of protecting the Indians in the free and uninterrupted enjoyment of their lands, and authority is given (§ 16) to employ the military force of the United States to apprehend all persons who shall be found in the Indian country, in violation of any of the provisions of the act, and deliver them up to the civil authority, to be proceeded against in due course of law.

It may not be improper here to notice some diversity of opinion that has been entertained with respect to the construction of the nineteenth section of this act, which declares that nothing therein contained shall be construed to prevent any trade or intercourse with the Indians living on lands surrounded by settlements of citizens of the United States, and being within the ordinary jurisdiction of any of the individual states. It is understood that the state of Georgia contends that the Cherokee nation come within this section, and are subject to the jurisdiction of that state. Such a construction makes the act inconsistent with itself, and directly repugnant to the various treaties entered into between the United States and the Cherokee Indians. The act recognizes and adopts the boundary line as settled by treaty. And by these treaties which are in full force, the United States solemnly guaranty to the Cherokee nation all their lands not ceded to the United States, and these lands lie within the chartered limits of Georgia; and this was a subsisting guaranty under the treaty of 1791, when the act of 1802 was passed. It would require the most unequivocal language to authorize a construction so directly repugnant to these treaties.

But this section admits of a plain and obvious interpretation, consistent with other parts of the act, and in harmony with these treaties. The reference undoubtedly is to that class of Indians which has already been referred to, consisting of the mere remnants of tribes, which have become almost extinct, and who have in a great measure lost their original character, and abandoned their usages and customs, and become subject to the laws of the state, although in many parts of the country living together and surrounded by the whites. They cannot be said to have any distinct government of their own, and are within the ordinary jurisdiction and government of the state where they are located.

But such was not the condition and character of the Cherokee nation, in any respect whatever, in the year 1802, or at any time since. It was a numerous and distinct nation, living under the government of their own laws, usages and customs, and in no sense under the ordinary jurisdiction of the state of Georgia, but under the protection of the United States, with a solemn guaranty by treaty of the exclusive right to the possession of their lands. This guaranty is to the Cherokees in their national capacity. Their land is held in common, and every invasion of their possessory right is an injury done to the nation, and not to any individual. No private or individual suit could be sustained; the injury done being to the nation, the remedy sought must be in the name of the nation. All the rights secured to these Indians, under any treaties made with them, remain unimpaired. These treaties are acknowledged by the United States to be in full force, by the proviso of the seventh section of the act of the 28th May, 1830 (4 Stats. at Large, 412), which declares that nothing in this act contained shall be construed as authorizing or

directing the violation of any existing treaty between the United States and any Indian tribes.

That the Cherokee nation of Indians have, by virtue of these treaties, an exclusive right of occupancy of the lands in question, and that the United States are bound under their guaranty to protect the nation in the enjoyment of such occupancy, cannot, in my judgment, admit of a doubt; and that some of the laws of Georgia set out in the bill are in violation of, and in conflict with, those treaties and the act of 1802, is to my mind equally clear. But a majority of the court having refused the injunction, so that no relief whatever can be granted, it would be a fruitless inquiry for me to go at large into an examination of the extent to which relief might be granted by this court, according to my own view of the case.

§ 135. *Under what circumstances the supreme court adjudicates the constitutionality of a state law.*

I certainly, as before observed, do not claim as belonging to the judiciary the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights, secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here.

§ 136. *The legislation of Georgia complained of by the Cherokee nation is in violation of the constitution and treaties of the United States.*

The laws of Georgia set out in the bill, if carried fully into operation, go the length of abrogating all the laws of the Cherokees, abolishing their government, and entirely subverting their national character. Although the whole of these laws may be in violation of the treaties made with this nation, it is probable this court cannot grant relief to the full extent of the complaint. Some of them, however, are so directly at variance with these treaties, and the laws of the United States touching the rights of property secured to them, that I can perceive no objection to the application of judicial relief. The state of Georgia certainly could not have intended these laws as declarations of hostility, or wish their execution of them to be viewed in any manner whatever as acts of war, but merely as an assertion of what is claimed as a legal right; and in this light ought they to be considered by this court.

The act of the 21 of December, 1830, is entitled "An act to authorize the governor to take possession of the gold and silver and other mines lying and being in that section of the chartered limits of Georgia, commonly called the Cherokee country, and those upon all other unappropriated lands of the state, and for punishing persons who may be found trespassing on the mines." The preamble to this act asserts the title to these mines to belong to the state of Georgia, and by its provisions \$20,000 are appropriated and placed at the disposal of the governor to enable him to take possession of those mines; and it is made a crime, punishable by imprisonment in the penitentiary of Georgia, at hard labor, for the Cherokee Indians to work these mines. And the bill alleges that under the laws of the state in relation to the mines, the governor



has stationed at the mines an armed force, who are employed in restraining the complainants in their rights and liberties in regard to their own mines, and in enforcing the laws of Georgia upon them. These can be considered in no other light than as acts of trespass; and may be treated as acts of the state and not of the individuals employed as the agents. Whoever authorizes or commands an act to be done may be considered a principal and held responsible, if he can be made a party to a suit, as the state of Georgia may undoubtedly be. It is not perceived on what ground the state can claim a right to the possession and use of these mines. The right of occupancy is secured to the Cherokees by treaty, and the state has not even a reversionary interest in the soil. It is true that, by the compact with Georgia, of 1802, the United States have stipulated to extinguish, for the use of the state, the Indian title to the lands within her remaining limits, "as soon as it can be done peaceably and upon reasonable terms." But until this is done the state can have no claim to the lands.

The very compact is a recognition by the state of a subsisting Indian right, and which may never be extinguished. The United States have not stipulated to extinguish it, until it can be done "peaceably and upon reasonable terms;" and whatever complaints the state of Georgia may have against the United States for the non-fulfillment of this compact, it cannot affect the right of the Cherokees. They have not stipulated to part with that right; and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of the territory.

Again, by the act of the 21st December, 1830, surveyors are authorized to be appointed to enter upon the Cherokee territory and lay it off into districts and sections, which are to be distributed by lottery among the people of Georgia; reserving to the Indians only the present occupancy of such improvements as the individuals of their nation may now be residing on, with the lots on which such improvements may stand, and even excepting from such reservation improvements recently made near the gold mines.

This is not only repugnant to the treaties with the Cherokees, but directly in violation of the act of congress of 1802; the fifth section of which makes it an offense punishable with fine and imprisonment, to survey or attempt to survey or designate any of the boundaries, by marking trees or otherwise, of any land belonging to or secured by treaty to any Indian tribe; in the face of which, the law of Georgia authorizes the entry upon, taking possession of, and surveying, and distributing by lottery, these lands guaranteed by treaty to the Cherokee nation; and even gives authority to the governor to call out the military force, to protect the surveyors in the discharge of the duties assigned them.

These instances are sufficient to show a direct and palpable infringement of the rights of property secured to the complainants by treaty, and in violation of the act of congress of 1802. These treaties and this law are declared by the constitution to be the supreme law of the land; it follows, as a matter of course, that the laws of Georgia, so far as they are repugnant to them, must be void and inoperative. And it remains only very briefly to inquire, whether the execution of them can be restrained by injunction according to the doctrine and practice of courts of equity.

§ 137. *An injunction is grantable where there is no adequate remedy at law and the injury threatened is irreparable.*

According to the view which I have already taken of the case, I must con-

sider the question of right as settled in favor of the complainants. This right rests upon the laws of the United States, and treaties made with the Cherokee nation. The construction of these laws and treaties is a pure question of law, and for the decision of the court. There are no grounds, therefore, upon which it can be necessary to send the cause for a trial at law of the right, before awarding an injunction; and the simple question is, whether such a case is made out by the bill as to authorize the granting an injunction.

This is a prohibitory writ, to restrain a party from doing a wrong or injury to the rights of another. It is a beneficial process for the protection of rights, and is favorably viewed by courts of chancery, as its object is to prevent rather than redress injuries; and has latterly been more liberally awarded than formerly. 7 Ves. Jr., 307.

The bill contains charges of numerous trespasses, by entering upon the lands of the complainants, and doing acts greatly to their injury and prejudice, and to the disturbance of the quiet enjoyment of their land, and threatening a total destruction of all their rights. And although it is not according to the course of chancery to grant injunctions to prevent trespasses when there is a clear and adequate remedy at law, yet it will be done when the case is special and peculiar, and when no adequate remedy can be had at law, and particularly when the injury threatens irreparable ruin. 6 Ves., 147; 7 Eden, 307. Every man is entitled to be protected in the possession and enjoyment of his property; and the ordinary remedy by action of trespass may generally be sufficient to afford such protection. But where, from the peculiar nature and circumstances of the case, this is not an adequate protection, it is a fit case to interpose the preventive process of injunction. This is the principle running through all the cases on this subject, and is founded upon the most wise and just considerations, and this is peculiarly such a case. The complaint is not of a mere private trespass admitting of compensation in damages, but of injuries which go to the total destruction of the whole right of the complainants. The mischief threatened is great and irreparable. 7 Johns. Ch., 330. It is one of the most beneficial powers of a court of equity, to interpose and prevent an injury before any has actually been suffered; and this is done by a bill, which is sometimes called a bill *quia timet*. Mitford, 120.

The doctrine of this court in the case of *Osborn v. The United States Bank*, 9 Wheat., 738 (Const., §§ 2363-87), fully sustains the present application for an injunction. The bill in that case was filed to obtain an injunction against the auditor of the state of Ohio, to restrain him from executing a law of that state, which was alleged to be to the great injury of the bank and to the destruction of rights conferred by their charter. The only question of doubt entertained by the court in that case was, as to issuing an injunction against an officer of the state to restrain him from doing an official act enjoined by statute, the state not being made a party. But even this was not deemed sufficient to deny the injunction. The court considered that the Ohio law was made for the avowed purpose of expelling the bank from the state, and depriving it of its chartered privileges; and they say, if the state could have been made a party defendant, it would scarcely be denied that it would be a strong case for an injunction; that the application was not to interpose the writ of injunction, to protect the bank from a common and casual trespass of an individual, but from a total destruction of its franchise, of its chartered privileges, so far as respected the state of Ohio. In that case the state could not be made a party, according to the eleventh amendment of the constitution; the complainants

being mere individuals and not a sovereign state. But, according to my view of the present case, the state of Georgia is properly made a party defendant, the complainants being a foreign state.

The laws of the state of Georgia in this case go as fully to the total destruction of the complainants' rights as did the law of Ohio to the destruction of the rights of the bank in that state; and an injunction is as fit and proper in this case to prevent the injury, as it was in that.

§ 138. *An injunction operates in personam, not in rem.*

It forms no objection to the issuing of the injunction in this case, that the lands in question do not lie within the jurisdiction of this court. The writ does not operate *in rem*, but *in personam*. If the party is within the jurisdiction of the court, it is all that is necessary to give full effect and operation to the injunction; and it is immaterial where the subject-matter of the suit, which is only affected consequentially, is situated. This principle is fully recognized by this court in the case of *Massie v. Watts*, 6 Cranch, 157, where this general rule is laid down, that, in a case of fraud, of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of the court may be affected by the decree. And reference is made to several cases in the English chancery recognizing the same principle. In the case of *Penn v. Lord Baltimore*, 1 Ves., 444, a specific performance of a contract respecting lands lying in North America was decreed, the chancellor saying the strict primary decree of a court of equity is *in personam*, and may be enforced in all cases when the person is within its jurisdiction.

Upon the whole, I am of opinion: 1. That the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia. 2. That the bill presents a case for judicial consideration arising under the laws of the United States, and treaties made under their authority with the Cherokee nation, and which laws and treaties have been and are threatened to be still further violated by the laws of the state of Georgia referred to in this opinion. 3. That an injunction is a fit and proper writ to be issued to prevent the further execution of such laws, and ought, therefore, to be awarded. And I am authorized by my brother Story to say that he concurs with me in this opinion.

KARRAHOO v. ADAMS.

(Circuit Court for Kansas: 1 Dillon, 344-348. 1870.)

STATEMENT OF FACTS.—Action of ejectment brought by plaintiff, a Wyandotte Indian, against defendant, a citizen of Kansas. Motion made by defendant that the cause be dismissed for want of jurisdiction.

Opinion by DILLON, J.

The action is ejectment for a tract of land situate within the limits of the state of Kansas; and there is no allegation in the petition showing that the case is one arising under the constitution, laws or treaties of the United States. There is no suggestion that this court has jurisdiction by reason of the subject-matter or character of the action.

§ 139. *An Indian is not a foreign citizen or subject within the meaning of the second section of the third article of the constitution.*

It is also to be observed that there is no claim that the court has jurisdiction because the controversy or suit is one between "citizens of different states,"

for the plaintiff has, by express averment, declared that she is not a citizen of the United States or of any of the states. No question is therefore presented as to the operation or effect of the recent amendment to the constitution, or the act of congress of April 9, 1866 (14 Stats. at Large, 27, sec. 1), upon Indians who are taxed. The plaintiff is a Wyandotte Indian residing in this state; and reference is made in the petition to the treaty of that tribe with the United States, made January 31, 1855. 10 Stats. at Large, 1159. This treaty, among other things, dissolves the tribal relations of the Wyandotte Indians, and declares them "to be citizens of the United States to all intents and purposes, and entitled to all the rights, privileges and immunities of such citizens, and subject to the laws of the United States and of the territory of Kansas." But this treaty excepted, in this particular, such Indians as applied to be exempt from its operation, among whom was the plaintiff. Since then Kansas has been admitted into the Union as a state. The counsel for the plaintiff maintains that the courts of the United States have jurisdiction under that portion of section 2 of article 3 of the constitution, which, *inter alia*, provides that "the judicial power shall extend . . . to controversies between a state or citizens thereof, and foreign states, citizens or subjects." The claim is that the plaintiff, within the meaning of the clause just quoted, is a *foreign citizen or subject*.

This is not so. Indian tribes residing within the United States are not foreign states. In the case of *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1, 19 (§§ 111-38, *supra*), the supreme court of the United States held, after mature deliberation, "that an Indian tribe or nation, within the United States, is not a foreign state or nation in the sense of the constitution, and cannot maintain an action in the courts of the United States "on the ground that it is a foreign state." If, as thus held, the tribe is not a foreign state, it necessarily results that the persons composing the tribe are not foreign citizens or subjects. Since the Indians are within the jurisdiction and subject to the laws of the United States, or the different states within which they reside, or both, it is difficult to see on what ground, or with what propriety, they can be regarded as *foreign* citizens or subjects. *Mackey v. Cox*, 18 How., 100, 104, *per* McLean, J.; *Worcester v. State of Georgia*, 6 Pet., 515 (§§ 12-52, *supra*).

Where Indians reside within the limits of a state, the relations which they bear respectively to the state and to the national government are very peculiar, and frequently present difficult and perplexing questions. *United States v. Yellow Sun*, 1 Dill., 271 (§§ 140, 141, *infra*), and cases cited; *McCracken v. Todd*, 1 Kans., 148; *Hunt v. State*, 4 id., 60. But no such questions now arise, and since there is no provision in the judiciary act, or any other act of congress, giving to the courts of the United States jurisdiction in civil suits by or against Indians, we need not consider whether such jurisdiction could be constitutionally conferred by congress as respects Indians not citizens, living within state limits, and with respect to cases not arising under the constitution, laws or treaties of the United States.

That Indians are not *foreign* citizens or subjects within the meaning of the constitution, and that the court has no jurisdiction of the present suit, will further appear by reference to the eleventh section of the judiciary act, which prescribes the jurisdiction of the circuit court of the United States. This section of the act makes no mention of Indians, and does not use the words, foreign citizens or subjects; but instead thereof, it gives the circuit courts jurisdiction

where *an alien* is a party, showing quite clearly that the framers of this famous statute understood the words of the constitution "foreign citizens or subjects," to mean aliens and not resident Indians.

Again, it is to be remembered that the circuit court is a court of limited jurisdiction, and can exercise it only in cases in which it is expressly conferred by congress. There is no act of congress which undertakes to confer such jurisdiction in favor of an Indian, not a citizen, but resident within a state, and against a citizen of the state. The motion to dismiss the cause must prevail.

DELAHAY, J., concurs.

UNITED STATES *v.* SA-COO-DA-COT.

(Circuit Court for Nebraska: 1 Abbott, 377-383; 1 Dillon, 271. 1870.)

STATEMENT OF FACTS.—The defendants, Indians, were found guilty of the murder of a white man in Nebraska. No question of jurisdiction was raised on the trial, but the point was made in a motion in arrest, which was afterwards withdrawn. The case now comes up on a motion by the government for judgment on the verdict.

Opinion by DILLON, J.

The present attitude of this case is not a little singular. The one party asks, and the other party, acting under the advice of skilful counsel, does not resist, a judgment which is the highest human laws or a human tribunal can inflict. It is the court alone which hesitates and deliberates. In explanation of the course which the counsel for the defendants have taken in withdrawing all questions as to the jurisdiction of the court, a reason has been given which, for the honor of the people of the state, it is hoped can have no real foundation, viz.: that such is the strength of the tide of local feeling and prejudice against them and their nation that they prefer to take a sentence of death, and trust to executive interposition, than to run the risk of illegal violence, if discharged from the court, or turned over to the authorities of the state. The court gladly avails itself of this occasion to express its conviction that fears of this character are groundless.

As the defendants have been duly indicted and convicted, it is the duty of the court to pass judgment against them, if it has jurisdiction of the crime charged in the indictment. Whether it has jurisdiction is the only question remaining to be decided. Notwithstanding the withdrawal of the motion in arrest, it is still the duty of the court, before pronouncing the sentence of death, to be satisfied that it has cognizance of the offense which it is proceeding to punish. No act that a court can be called on to perform is more grave and solemn than to render a capital judgment. To the performance of such a duty a judge is only reconciled by the consideration that it is not he who does it, but the *law*, of which he is simply the minister. But if the law invests him in the particular case with no such power, he may well deliberate and must refuse to exercise it.

If the court has no jurisdiction, therefore, it is its duty, on its own motion, to stay judgment, although this question may not be made or may be waived by counsel. With these preliminary considerations, which seemed proper to be stated, we proceed to examine the question whether the courts of the United States have jurisdiction of the offense for which the defendants have been convicted.

The only allegations in the indictment made with a view to show the jurisdiction of the court are the following: "That the defendants are Indians belonging to the Pawnee tribe, which tribe are, and were, in charge of a United States Indian agent duly appointed by the United States, and were, and are, living upon an Indian reservation known as the Pawnee reservation, within the state of Nebraska; that said defendants crossed the boundary line of said Indian reservation and entered into the county of Polk, in the state of Nebraska aforesaid, and then and there unlawfully," etc., etc., did kill and murder by shooting, as particularly described in the indictment, one Edward McMurty, a white inhabitant of the said state.

Thus, it appears from the express averments of the indictment that the place where the offense was committed was within the body of the county of Polk, in the state of Nebraska, and not within the limits of the Indian reservation. The proof, in this respect, corresponds with the allegations. The offense is alleged, and was shown to have been committed on May 8, 1869, which was after Nebraska had been admitted into the Union, and her organization as a state was fully perfected and in operation. The question is, whether the offense thus committed is one of which the courts of the United States have cognizance, or whether it is alone cognizable by the courts of the state of Nebraska.

Within the territorial limits of the state just named is a body of people known as the Pawnee tribe of Indians, to which the defendants belong. This region has for many years been their home; but their occupancy is now restricted to a "reservation" of limited extent. Here they reside in a body, maintaining their tribal organization under the superintendency of agents appointed by the government of the United States. They are already in the midst of a white population, but do not enjoy any of the political, nor many of the civil, rights of the latter. They do not vote, are not taxed, and under the decision of the supreme court of the United States their property is not taxable by the state authorities. The ordinary state laws relating to taxation, schools, marriage, divorce, administration of estates, and the like, are not extended to, observed by, or enforced among them. As respects all their internal concerns, they are governed and regulated by the laws and customs of the tribe.

The inquiry is neither uninteresting nor unimportant as to which, whether the general government or the state, has legislative control over this people; and if both, whether the power is concurrent, and if not, where is the boundary line, marking where the control of the one ends, and where that of the other begins. This inquiry it is our duty to answer, so far as the record in this case requires it. It is necessary to examine into the acts of congress, relating to offenses committed by Indians, into the treaty stipulations of the United States with the Pawnees, and into the acts of congress respecting the powers and jurisdictions of the state of Nebraska.

Nebraska was organized into a territory by the act of May 30, 1854, and by that act (§§ 4, 37) the rights of Indians therein are preserved unimpaired, and the authority of the United States to make regulations respecting them, their property and other rights, by treaty, law, or otherwise, retained. The Pawnee tribe then, as now, resided within the limits of the territory thus created. On September 24, 1857, the Pawnees ceded by treaty of that date their lands in the territory of Nebraska to the United States, reserving, however, "out of this cession a tract of country thirty miles long from east to west, and fifteen

miles wide from north to south." 11 Stat. at L., 729. This is the reservation described in this indictment.

The treaty provides that United States agents may reside on the reservation; that the government may build forts thereon; that the whites may open roads through it, but shall not reside thereon; that the Indians shall not alienate the lands, except to the United States; that all the offenders against the laws of the United States shall be delivered up, etc.; but it contains no *stipulation* as to the *jurisdiction* over it, or over the *Indians* residing thereon, when the territory shall be admitted as a state. On April 19, 1864, congress passed an act to enable the people of Nebraska to form a state constitution; in 1866 a state constitution was formed, and in 1867 congress passed an act for the admission of Nebraska, under its constitution, into the Union, "upon an equal footing with the original states, in all respects whatsoever."

There is no exception in the state constitution, or in either of these acts of congress, of the Pawnee reservation or the Pawnee Indians, from the territorial or civil jurisdiction of the state. So that we have before us the case of Indians maintaining the tribal organization, which is recognized in the treaty by the general government, but living upon a reservation which is *now within* the limits of the state, and respecting which, or the Indians occupying it, there are no special provisions granting or retaining jurisdiction in favor of the United States, or withdrawing the Indians from the jurisdiction of the state.

It will be observed that the present indictment is not for an offense committed by Indians against an inhabitant of the state upon the reservation, and hence we have no occasion to inquire whether for such offenses the courts of the United States or those of the state of Nebraska have jurisdiction; nor whether it would be competent for congress in such a case (the absence of any cession of jurisdiction by the state) to invest the national courts with cognizance thereof.

See, on this point, *United States v. Bailey*, 1 McL., 234 (§§ 150-55, *infra*), and the case therein referred to against two Indians for the murder of Davis in the Cherokee country, within the limits of a state. *United States v. Cisna*, id., 254; *United States v. Ward*, opinion of Mr. Justice Miller, McCahon (Kansas), 119; S. C., Woolw., —; *United States v. Stohl*, opinion of Miller, J., McCahon (Kansas), 206; S. C., Woolw., —; *United States v. Rogers*, 4 How., 567; *United States v. Holliday*, 3 Wall., 407 (§§ 200-204, *infra*). Compare *Kansas Indians*, 5 id., 737 (§§ 53-58, *supra*), and remarks of Davis, J., *arguendo*, p. 755; *New York Indians*, id., 761; *Worcester v. Georgia*, 6 Pet., 515 (§§ 12-52, *supra*) *New York v. Dibble*, 21 How., 366.

As to *state* authority over Indians, see, also, *Goodell v. Jackson*, 21 Johns., 693, and constitutional provisions and act of April 12, 1822, 2 Rev. Stat. 881, there cited; *Murray v. Wooden*, 17 Wend., 531; *Swan's Ohio Stat.*, 304; *Rev. Stat. Mass.*, 148; *Clay v. State*, 4 Kans., 49; *People v. Antonio*, 27 Cal., 484; *Hicks v. Euhartona*, 21 Ark., 106; id., 485; *Peters' Case*, 2 Johns. Cas., 344.

It will appear from these authorities and citations that New York, Ohio and other states have, at different times, passed acts declaring that the civil and criminal jurisdiction of these states extended to Indians and to Indian reservations; and that such legislation has been considered valid when not in conflict with some treaty or constitutional act of congress.

§ 140. *No common law offenses cognizable by United States courts.*

The *locality* or *place* where the homicide now in question is alleged to have been committed is confessedly within the territorial limits of the state, and the

deceased was an inhabitant of or found within the state. It is settled that there are no common law offenses cognizable by the courts of the United States; that before these courts can take cognizance of an offense, it must be declared such by an act of congress; and that it is not competent for congress to enact a criminal code punishing offenses generally, but those only which relate to the general government, or which are committed by or upon citizens or inhabitants of the United States, upon the high seas, or within the national domain beyond the limits of any state, or in places over which congress has exclusive jurisdiction. The offense charged in the indictment is murder; and we now inquire whether there is any act of congress which confers, or undertakes to confer, jurisdiction upon the national courts of a homicide committed under the circumstances of the one under consideration?

There are two statutes relating to murder, cognizable by the United States courts—the statute of 1790, and that of 1825. The former act provides that if any person shall, “within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States,” commit the crime of wilful murder, etc., he shall be punished, etc.

The latter act declares “That if any person upon the high seas or any river, etc., within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state,” shall commit wilful murder, etc., he shall suffer death. It is scarcely necessary to remark that the case at bar falls within none of the provisions of either of these statutes. These do not undertake to punish murder generally, but only when committed on water out of the jurisdiction of any state, or upon land when committed at a place within the exclusive jurisdiction of the United States. If other provisions do not exist, it is evident that the court had no cognizance of the case made in the indictment.

We have been referred to the intercourse act of 1802 (2 Stat. at L., 137, 143, §§ 14, 15), by which congress defined the “Indian country,” and provided for the punishment by the United States courts of Indians who left the Indian country and committed offenses in any state or territory. It must have escaped the attention of counsel that this act, so far as it relates to Indian tribes west of the Mississippi, was repealed as long ago as June 30, 1834. 4 Stat. at L., 729, § 29. As it will not be maintained that a prosecution can be supported under a repealed statute, we need give it no further attention.

The jurisdiction of the court is also sought to be sustained under the act of June 30, 1834, just cited. By section 1 of that statute it is enacted, “That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, shall be taken and deemed to be the Indian country.” By a subsequent section this Indian country is annexed, part to the judicial district of Arkansas, and the rest to the judicial district of Missouri. Section 25 is in these words:

“So much of the laws of the United States as provide for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country: *Provided*, that the same shall not extend to crimes committed by one Indian against the person or property of another Indian.”

At the time this statute was enacted it applied to the locality where the offense in question was committed; but it ceased to be operative within the limits of Nebraska the moment when the latter was admitted into the Union



as a state upon an equal footing with the original states. This is the precise point decided by Mr. Justice Miller in *United States v. Ward*, *supra*, and it is quite unnecessary to enlarge upon it or repeat the reasons by which the conclusion is supported. That was an indictment of a white man for the murder of a white man, committed on an Indian reservation, within the state of Kansas, and it was held that the national courts had no jurisdiction, and the opinion expressed that the state courts had.

In *United States v. Bailey*, 1 McLean, 235 (§§ 150-55, *infra*), a case is referred to in the Tennessee district, where, in 1816, two Indians were indicted in the United States circuit court for the murder of a white man, on a reservation, in the Cherokee country, *within the limits of the state*, and it was decided that the United States court had no jurisdiction; and this decision in the Tennessee case was the occasion of the passage of the act of 1817 (3 Stat. at L., 383), which (after the decision of the Bailey case) was *repealed* (4 *id.*, 729, 734), whereby congress provided for the punishment in the national courts of offenses committed by Indians or others, upon Indian lands, within state limits. This decision referred to would preclude this court from taking jurisdiction in the case at bar, had the homicide been committed by the defendants *within the limits of the reservation*; but, as before remarked, the court has no occasion to give any opinion on this point. But if it could not take cognizance of offenses committed upon the reservation, it surely cannot of those committed beyond its limits.

And it seems impossible to hold that this court has jurisdiction in this case without necessarily implying that the courts of the state have not; and if they have not, then we decide that the state of Nebraska has not the power to make her ordinary criminal statutes co-extensive with the state limits and enforce them against all persons living or found therein. Such a power we are not prepared to deny to the state, in the absence of some conflicting treaty stipulation or valid act of congress.

§ 141. *The circuit courts of the United States have no jurisdiction in case of murder committed by Indians in a state.*

No statutes, other than those above noticed, have been referred to by counsel as giving the court jurisdiction in the present case, and these we hold do not confer it. This conclusion is supported by many of the cases before cited, and is opposed to none of them. Of its correctness the court entertains no doubt. In view of the peculiar relations which the general government sustains to the Indian tribes, I think I ought to observe that I am not at present prepared to yield assent to the opinion which Mr. Justice McLean seems to have entertained in Bailey's case, that congress had no power to pass the act of 1817 (3 Stat. at L., 383); that is, congress could not, if it saw fit, make punishable in the national courts offenses committed by or against Indians upon reservations in state limits. And it might be worth the consideration of congress whether some such legislation would not be expedient.

But if it be conceded that under the power of peace and war, to make treaties, and to regulate commerce with Indian tribes (*Worcester v. Georgia*, 6 Pet., 515; §§ 12-52, *supra*), congress could, in the absence of reserved right to do so, withdraw Indians living within the limits of a state entirely from state jurisdiction and the reach of its criminal laws and process for offenses against its citizens committed off a reservation, it would seem most improbable that such a power would ever be exercised. We have seen that, in point of fact, congress has not undertaken to exercise it, and therefore this court, which

can take cognizance only of offenses created by some act of congress, has no jurisdiction of the crime charged in the indictment. The defendants must be discharged.

Under the circumstances of the case, the defendants having been convicted and entitled to be discharged only for want of jurisdiction, and following the course pursued in a similar case (*United States v. Cisna*, 1 McLean, 254), we deem it our duty to enter the following special order:

*Ordered*, That the district attorney of the United States notify, without delay, the governor of this state, or the proper district attorney, of this order: That the marshal retain the custody of the defendants, and safely keep them for the space of twenty days, within which time he will deliver them over to any authorized officer of the state, producing a writ for their arrest. If no such writ is presented within the time limited, he will discharge them from custody, or, if they desire it, place them in the charge of the United States Indian agent or superintendent for the tribe to which they belong.

DUNDY, J., concurred.

#### EX PARTE REYNOLDS.

(Circuit Court for Arkansas: 5 Dillon, 394-404. 1879.)

The petitioner in this case was committed for murder, and made application for a discharge on *habeas corpus*.

Opinion by PARKER, J.

In this case the petitioner asks to be discharged on the ground that the evidence taken before the United States commissioner shows that this court has no jurisdiction. In order to make jurisdiction complete in this court, the court must have the right under the law to take cognizance of the offense.

§ 142. *The criminal jurisdiction of the United States courts is limited.*

Such right, as far as this court is concerned, depends upon three things: First, the nature of the offense; second, the *status* as to nationality of the person committing it and the person against whom it is committed; and, third, the place where it is committed. This is so, because the criminal jurisdiction of the courts of the United States is limited, and is generally dependent upon the nature of the offense and the place where the same is committed, and the jurisdiction of this court is dependent upon all three of the requisites set out above.

§ 143. *If criminal and victim are both Indians, United States court has no jurisdiction.*

In order to give this court jurisdiction of the crime of murder, of which the defendant stands charged, it must appear that the crime was committed in the Indian country, and that the person who committed it is not one of those persons known as an Indian, or, if he is an Indian, that the person upon whom the crime was committed was not an Indian. If the person charged and the person upon whom the crime was committed are both Indians, under section 2446 of the intercourse law (R. S. of 1873, p. 376), this court has no jurisdiction, because, by the terms of said section, the general laws of the United States defining crimes and providing for their punishment do not extend to "offenses committed by one Indian upon the person or property of another Indian;" but the same are left by the laws of the United States to be dealt with by the Indian authorities.

It is claimed in this case that both Reynolds, the defendant, and Puryear, the man who was killed, were Indians. If so, that ends the power of this court to hold the defendant in custody. It is not contended that Reynolds and Puryear are Indians by birth—that is, that they belong to the race generally, or to the family of Indians; but it is claimed that they are Indians in law, by reason of their marriage to persons who do belong to the family of Indians—who belong to the Choctaw nation or tribe of Indians.

§ 144. *Status of a person marrying Indian resident of the nation.*

It is provided by the thirty-eighth article of the treaty of 1866 between the Choctaw nation and the government of the United States, that “every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw.” This article of the treaty permits a citizen of the United States to place himself beyond the jurisdiction of the laws of the United States by joining himself in marriage to an Indian who is of the Choctaw or Chickasaw tribe, and by residence in their country. Before a citizen—that is, one of the sovereign people, a constituent member of the sovereignty—can expatriate himself under this section of the treaty, and place himself beyond the jurisdiction of the courts of the United States, there must be a concurrence of certain things, to wit, marriage to a Choctaw or Chickasaw, and residence in the country of one or the other of these tribes. It is contended in this case that both Reynolds and Puryear have married women who are Choctaws. Then the material inquiry in this case is, were the wives of Reynolds and Puryear Choctaw Indians? In order to give this court jurisdiction, one of these women must have been a member of the body politic which is composed of the citizens of the United States, and the members of which are subject to the laws of the United States; in other words, she must have been a citizen of the United States. What does the evidence show? It shows that the wife of Reynolds was born in the state of Mississippi, and that her mother had Indian blood in her veins, and that her father was a full-blooded Choctaw. If we invoke the principle that when the members of an Indian tribe scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States and, equally with the citizens thereof, subject to the jurisdiction of the courts thereof (Senate Report, 268, p. 11, 41st Congress, 3d session; 2 Story on the Constitution, 655; 19 How., 403),—it may, to say the least of it, become a very serious question whether Mrs. Reynolds is, under the evidence in this case, a Choctaw Indian, notwithstanding her Indian blood. But suppose it is conceded that she is an Indian of the Choctaw tribe, that is not enough.

§ 145. *The court has jurisdiction if one of the parties is of the white race.*

Reynolds being a white man by nationality, by birth, and, if at all, only an Indian by marriage, in order to take away the right of this court to try him for the alleged killing of Puryear, he (Puryear) must also be an Indian, either by blood or marriage; because the court still has jurisdiction if one of the parties—either the party committing the offense or the party against whom it is committed—is one of the white race, or belongs to the nationality of the

people of the United States. Is Puryear an Indian? He is not by blood. Is he by marriage? What is the *status* of his wife? If she is not an Indian in law, then he is not made a Choctaw by marriage with her; and if not, the question of his residence at the time he was killed cuts no figure in the case, for if he was a white man in law, and was killed in the Indian country by Reynolds, although Reynolds may have been an Indian, this court has jurisdiction under the treaty. If either marriage with an Indian or residence in the Indian country is wanting, white persons are not Choctaws. What does the evidence show as to the nationality of Mrs. Puryear? It shows that her mother had some Indian blood in her veins; that her father also had some Indian blood, but that her paternal grandfather was a full-blooded white man; that she was born and raised in the state of Mississippi, and married to Mr. Puryear in that state. Now we must find to what nationality she belongs — if she is a citizen of the United States or a Choctaw woman. In order to do this we must find some rule to guide us in tracing her nationality. If we desire to do this correctly we must look to the *status* of the Indian people. They are not citizens, although born in the United States; at least the courts have always so held. Whether the government can subject them to its jurisdiction is not a material question here. It has not been done in the case of an offense committed by one Indian upon another; and, under the laws as they now stand, not being subject to the jurisdiction of the United States, they are not citizens thereof. Under the laws as they now are, these Indians, if members of a tribe, are not citizens or members of the body politic. The tribes are permitted by the United States to exist as distinct nations, or as distinct political societies, separated from others, capable of managing their own affairs and governing themselves.

§ 146. *Authorities reviewed.*

In the case of *Jackson v. Goodall*, 20 Johns., 193, the court, Mr. Justice Kent delivering the opinion, says: "In my view they (the Indians) have never been regarded as citizens or members of our body politic." . . . Again: "Still they are permitted to exist as distinct nations. . . . The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes. . . . In the treaties made with them we have the forms and requisites peculiar to the intercourse between friendly and independent states, and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require of existing and acknowledged sovereignty?"

In *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1 (§§ 111–38, *supra*), Chief Justice Marshall, among other things, says: "Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution? The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. *So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful.* They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violations of their engagements or for any aggressions committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these

treaties. The acts of the government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts."

Mr. Justice Johnson, who delivered a separate opinion in this case, states the condition of the Indian tribes: "Their right to personal self-government has never been taken from them, and such a form of government may exist, though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them, and such they certainly do possess. It has never been questioned." . . .

In *Worcester v. The State of Georgia*, 6 Pet., 515 (§§ 12-52, *supra*), Chief Justice Marshall again reviewed the relations existing between our government and the Indian tribes. In speaking of the relations of the Cherokee nation to the United States under the treaties made with them, he says: "*This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character and submitting as subjects to the laws of a master.*" . . . Again: "From the commencement of our government congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All of these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities — having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries; which is not only acknowledged, but guaranteed, by the United States." And again: "The very term 'nation,' so generally applied to them, means a people distinct from others. The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers which are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having a definite and well-understood meaning. We have applied them to Indians as we have applied them to other nations of the earth; they are applied to all in the same sense."

Again, in the case of *The Kansas Indians*, 5 Wall., 737 (§§ 53-58, *supra*), the supreme court of the United States hold: "If the tribal organization of Indian bands is recognized by the political department of the national government as existing — that is to say, if the national government makes treaties with and puts its Indian agents among them, paying subsidies and dealing otherwise with 'head men' in its behalf — the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites, in the midst of whom, by the advance of civilization, they have come to find themselves, does not authorize a state government to regard the tribal organization as gone, and the Indians as citizens of the state where they are, and subject to its laws."

The supreme court of the United States again gave its views of the *status* of the Indian in the case of *Dred Scott v. Sanford*, 19 How., 403. Speaking by the chief justice, the court declares: "That the Indian race formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But, although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were

situated in territories to which the white race claimed the ultimate right of dominion; but that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper; and neither the English nor the colonial governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments—as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration of the English colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our government. . . . But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of congress and become citizens of a state and of the United States; and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.”

Now, what is the principle to be deduced from all of these decisions of the supreme court? Why, that in cases where the United States has not, by its legislative or other acts, incorporated these people into the political body known as the people of the United States, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government, they are not citizens. These nations or tribes may not be absolutely independent powers—they may be domestic, dependent nations; but as long as the government of the United States, through its legislative department, continues to treat them as beyond the jurisdiction of the United States, so long they must be held to be *quasi* foreign nations, whose citizens are not regarded as American citizens, and not subjected to the full responsibility of such citizens. If the government of the United States has never recognized them as subject to its jurisdiction, and they have consequently never been treated as citizens, they occupy the same position before the law as though they were citizens of a power entirely independent of us, or were the people who were the citizens of a foreign power. If this be true, when the question arises as to what people a person belongs, what rule is to govern in the solution of the problem?

There is no statute law on the subject. We find that the question before the country at one time as to who was a white person and who was a member of the African race was solved by legislative or constitutional enactments defining the nationality of persons according to the quantum of white or African blood in the veins of the persons.

§ 147. *Whether nationality may be determined from quantum of blood.*

These laws were all enactments of the states and had reference to the African race alone. The United States never had any statute law on the subject (and has not now) with regard to persons who are not subject to its jurisdiction. Now, in this case, as the thirty-eighth article of the treaty only permits an American citizen, or a white person, to expatriate himself—to throw off his allegiance to the government of the United States—and place himself beyond the jurisdiction of its courts by marriage to a Choctaw and residence in their country, we must somewhere find a rule to define who is a

Choctaw, in a case where there is mixed parentage. Does the quantum of Indian blood in the veins of the party determine the fact as to whether such party is of the white or Indian race? If so, how much Indian blood does it take to make an Indian, or how much white blood to make a person a member of the body politic known as American citizens? Where do we find any rule on the subject which makes the quantum of blood the standard of nationality? Certainly not from the statute law of the United States; nor is it to be found in the common law. In the case of *The United States v. Sanders, Hempst.*, 486, the court held that the quantum of Indian blood in the veins *did not determine the condition of the offspring of a union between a white person and an Indian*; but further held that the condition of the mother did determine the question. And the court referred to the common law as authority for the position that the condition of the mother fixed the *status* of the offspring. The court is sustained in the first position by the common law, and also in the last position, if applied to the offspring of a connection between a freeman and a slave, upon the principle handed down from the Roman civil law, that the owner of a female animal is entitled to all her brood, according to the maxim *partus sequitur ventrem*. But by the common law this rule is reversed with regard to the offspring of free persons. Their offspring follows the condition of the father, and the rule *partus sequitur patrem* prevails in determining their *status*. 1 Bouvier's Institutes, 198, sec. 502; 31 Barb., 486; 2 Bouvier's Law Dictionary, 147; *Shanks v. Dupont*, 3 Pet., 242 (CITIZENS, §§ 21-33). This is the universal maxim of the common law with regard to freemen—as old as the common law, or even as the Roman civil law, and as well settled as the rule *partus sequitur ventrem*—the one being a rule fixing the *status* of freemen, the other being a rule defining the ownership of property—the one applicable to different political communities or states, whose citizens are in the enjoyment of the civil rights possessed by people in a state of freedom; the other defining the condition of the offspring which had been tainted by the bondage of the mother.

No other rules than the ones above enumerated ever did prevail in this or any other civilized country. In the case of *Ludlam v. Ludlam*, 31 Barb., 486, the court says: "The universal maxim of the common law being *partus sequitur patrem*, it is sufficient for the application of this doctrine that the father should be a subject lawfully, and without breach of his allegiance beyond sea, no matter what may be the condition of the mother.

The law of nations, which becomes, when applicable to an existing condition of affairs in a country, a part of the common law of that country, declares the same rule. Vattel, in his *Law of Nations* (page 101), says: "As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, these children naturally follow the condition of their fathers and succeed to their rights. . . . The country of the father is, therefore, that of the children, and these become true citizens merely by their tacit consent." Again, on page 102, Vattel says: "By the law of nature alone, children follow the condition of their fathers and enter into all their rights." This law of nature, as far as it has become a part of the common law, in the absence of any positive enactment on the subject, must be the rule in this case.

These Indians are freemen; the paternal ancestors of Mrs. Puryear were freemen. The rule applicable to the offspring of freemen is certainly applicable here, if the *status* of the Indian nations is as declared so often by the supreme court of the United States, because, if that be their true *status* as tribes

or nations, the question is to be solved in the same way as if one parent was a citizen of the United States and the other a citizen of a foreign nation.

The evidence in the case showing that the paternal grandfather of Mrs. Puryear was a white man, living in the state of Mississippi, and not with an Indian tribe—a citizen of the state of Mississippi and of the United States—the principles above enumerated make her father a citizen of the United States, and subject to the jurisdiction of the courts thereof. The same principles would make Mrs. Puryear a citizen of the United States, and subject to the jurisdiction of the courts thereof. That being the case, Mr. Puryear was married to a woman who was legally a member of the white race, or of the body politic known as citizens of the United States. He did not, therefore, become a Choctaw by marriage, but was a citizen of the United States, and being killed in the territorial jurisdiction of this court, it has jurisdiction, and the writ must be dismissed and the defendant remanded to the custody of the marshal.

*Ordered accordingly.*

UNITED STATES v. ROGERS.

(4 Howard, 567-574. 1845.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case is sent here by the circuit court of the United States, for the district of Arkansas, under a certificate of division of opinion between the justices of that court.

It appears by the record that William S. Rogers, a white man, was indicted in the above mentioned court for murder, charged to have been committed upon a certain Jacob Nicholson, also a white man, in the country now occupied and allotted by the laws of the United States to the Cherokee Indians.

The accused put in a special plea to the indictment, in which he avers that, having been a citizen of the United States, he, long before the offense charged is supposed to have been committed, voluntarily removed to the Cherokee country, and made it his home, without any intention of returning to the United States; that he incorporated himself with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe, and was domiciled in their country; that by these acts he became a citizen of the Cherokee nation, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of congress in that behalf made and provided; that the said Jacob Nicholson had in like manner become a Cherokee Indian, and was such at the time of the commission of the said supposed crime, within the true intent and meaning of the act of congress in that behalf made and provided; and that therefore the court had no jurisdiction to cause the defendant to make a further or other answer to the said indictment.

This is the substance of the plea, and to this plea the attorney for the United States demurred, setting down the causes of demurrer which appear in the foregoing statement of the case. Several questions have been propounded by the circuit court, which do not arise on the plea of the accused, and some of them we think cannot be material in the decision of the case, and need not therefore be answered by this court.

§ 148. *Congress may enact laws to punish crimes committed within Indian reservations which are not within a state.*

The country in which the crime is charged to have been committed is a part



of the territory of the United States, and not within the limits of any particular state. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.

It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices. But had it been otherwise, and were the right and the propriety of exercising this power now open to question, yet it is a question for the lawmaking and political department of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the states, congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian. Consequently the fact that Rogers had become a member of the tribe of Cherokees is no objection to the jurisdiction of the court, and no defense to the indictment, provided the case is embraced by the provisions of the act of congress of the 30th of June, 1834, entitled: "An act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers."

§ 149. *A white citizen of the United States who has joined and been adopted by an Indian tribe is punishable for a murder committed within the tribe's reservation, under the act of June 30, 1834, to regulate trade and commerce with Indian tribes, etc.*

By the twenty-fifth section of that act, the prisoner, if found guilty, is undoubtedly liable to punishment, unless he comes within the exception contained in the proviso, which is, that the provisions of that section "shall not extend to crimes committed by one Indian against the person or property of another Indian." And we think it very clear that a white man, who at mature age is adopted in an Indian tribe, does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally,—of the family of Indians; and it intended to leave

them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. And it would perhaps be found difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.

It may have been supposed that the treaty of New Echota, made with the Cherokees in 1835 (17 Stats. at Large, 478), ought to have some influence upon the construction of this act of congress, and extend the exception to all the adopted members of the tribe. But there is nothing in the treaty in conflict with the construction we have given to the law. The fifth article of the treaty stipulates, it is true, that the United States will secure to the Cherokee nation the right, by their national councils, to make and carry into effect such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them. But a proviso immediately follows, that such laws shall not be inconsistent with the constitution of the United States, and such acts of congress as had been or might be passed, regulating trade and intercourse with the Indians. Now the act of congress under which the prisoner is indicted had been passed but a few months before, and this proviso in the treaty shows that the stipulation above mentioned was not intended or understood to alter in any manner its provisions or affect its construction. Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of congress.

We are, therefore, of opinion that the matters stated in the plea of the accused do not constitute a valid objection to the jurisdiction of the court; and that, if he is found guilty upon the indictment, he is liable to the punishment provided by the act of congress before referred to, and is not within the exception in relation to Indians. And we shall direct this opinion to be certified to the circuit court as the answer to the several questions stated in the certificate of division. We abstain from giving a specific answer to each question, because, as we have already said, some of them do not appear to arise out of the case, and upon questions of that description we deem it most advisable not to express an opinion.

#### UNITED STATES v. BAILEY.

(Circuit Court for Tennessee: 1 McLean, 234-241. 1834.)

#### Opinion of the COURT.

STATEMENT OF FACTS.—The defendant, a white man, has been indicted for the murder of a white man in the state of Tennessee, and within the limits of the Indian country occupied by the Cherokees. A plea to the jurisdiction of the court has been filed, and it becomes the duty of the court to decide the question raised by the plea.

The indictment is found under the first section of the act of congress of 1817, which provides that "if any Indian, or other person or persons, shall, within the United States, and within any town, district, or territory belonging to any nation or nations, tribe or tribes of Indians, commit any crime, offense or misdemeanor, which if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would, by the laws of the United States, be punished with death, or any other punishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offense, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States."

§ 150. *Intent of the act of 1817.*

From the provisions of this section no doubt can be entertained that it was the intention of congress to punish all offenses specified; and especially the crime of murder committed in the Indian country, though within the limits of a state; and the jurisdiction of the court must be sustained, unless this act shall be found repugnant to the constitution of the United States. This is a grave question, involving on the one hand the life of a fellow being, and on the other the powers of the federal government.

At October term, 1816, of this court, an indictment was found against two Indians for killing Vincent Davis, a white man, on a public road passing through the Cherokee nation of Indians, ceded by treaty with the Cherokee nation to the United States. A plea to the jurisdiction being filed in the case, the court decided against the jurisdiction on the ground that there was no law of the United States which "makes the facts as charged and laid in said indictment a crime, affixes a punishment and declares the court which shall have jurisdiction of it." The failure of this prosecution, it is suggested, led to the passage of the act now called in question.

§ 151. *Federal government has limited powers.*

That the federal government is one of limited powers is a principle so obvious as not to admit of controversy, though the extent of those powers has given rise to much discussion and wide differences of opinion. It would seem however, to be clear, from the tenth article of the amendments to the constitution, which provides that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people, and from other considerations, that the federal government can exercise no powers beyond those which are expressly delegated to it. When, therefore, the validity of an act of congress is called in question, we must look to the constitution for the power to pass such an act.

§ 152. *Power to regulate commerce with Indian tribes.*

In the present case the power is alleged to be given by the third article in the eighth section of the constitution, which declares that congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." There is no other clause of the constitution which can have any bearing upon the point under consideration; and if the power is not given by this article, it is given nowhere.

On the part of the prosecution it is insisted that congress had power to pass the law in question; and that laws involving the same principle have been enforced by the courts of the United States. The intercourse law of 1802, and other acts of congress, and Indian treaties are referred to; and the de-

cisions of the supreme court and the circuit courts of the United States, under these laws, it is contended, sustain this position.

Under the power to regulate commerce with the Indian tribes, there is undoubtedly a wide scope for legislation; and that, too, without extending the power beyond what has been exercised in relation to foreign nations. Acts of non-intercourse have been passed; embargoes have been imposed, and other restrictions in a great variety of forms have been enacted, affecting foreign commerce, which are admitted to come within the constitutional powers of congress.

So as it regards the Indians, various laws have been passed under the above grant of power. The act of 1802 prohibits all intercourse with the Indians, by the whites, except on certain conditions. Agents and other persons are permitted to reside among them for the advancement of their prosperity, and to facilitate our commercial intercourse with them. The persons of these agents are protected from violence and injustice; and our citizens are punished for committing violence upon the persons or property of the Indians.

All these provisions come clearly within the scope of the power to regulate commerce with the Indian tribes; and substantially the same power has been exercised in regulating commerce with foreign nations. All intercourse with a foreign nation, as before remarked, may be prohibited, or it may be admitted under a license or permit. Our agents abroad are protected, and we punish depredations committed by our own citizens on the persons or property of a foreign people with whom we are at peace. Thus far it would seem the power may be exercised by congress, both as it relates to foreign nations and our Indian tribes.

But the act under consideration asserts a general jurisdiction for the punishment of offenses, over the Indian territory, though it be within the limits of a state. To the exercise of this jurisdiction within a territorial government there can be no objection, but the case is wholly different as it regards Indian territory within the limits of any state. In such case the power of congress is limited to the regulation of a commercial intercourse with such tribes of Indians that exist as a distinct community, governed by their own laws, and resting for their protection on the faith of treaties and laws of the Union. Beyond this, the powers of the federal government in any of its departments cannot be extended.

It is argued that unless the defendant can be tried under the act of congress, there is no law by which he can be punished. If on this ground the federal government may exercise jurisdiction, where shall its powers be limited? The constitution is no longer the guide when the government acts from the law of necessity. This law always affords a pretext for usurpation. It exists only in the minds of those who exercise the power, and if followed must lead to despotism.

§ 158. *Congress cannot, under the power to regulate commerce with the Indian tribes, exercise general jurisdiction over Indian territory within the limits of a state.*

It will not be pretended that congress can ever exercise jurisdiction over such parts of a state as may not be organized into counties. And yet is not this substantially the case under consideration? A murder has been committed by one white person on another within the Indian territory, which act in no respect is connected with the commerce of the Cherokee Indians, or interferes with their prosperity or safety. That congress have power to inflict punish-

ment on all who violate the laws which regulate a commercial intercourse with the Indians, who maintain a certain relation to the federal government, is admitted; but because this is a legitimate exercise of power, does it follow that the jurisdiction may be extended without limit?

Is the Cherokee territory subject to the jurisdiction of the federal government to the same extent as it may exercise over forts and arsenals where a cession of jurisdiction has been made by a state? In the act of 1807, congress seem to have considered their power as unlimited in the one case as in the other, as to the punishment of offenses; for they provide that the same punishment shall be inflicted for the commission of crimes within the Cherokee country, as for the like offenses if committed within any place or district of country under the sole and exclusive jurisdiction of the United States.

The Cherokee country can in no sense be considered a territory of the United States, over which the federal government may exercise exclusive jurisdiction; nor has there been any cession of jurisdiction by the state of Tennessee, or any prohibition to its exercise of jurisdiction over this territory, constitutionally, except such as the rights recognized and guaranteed to the Indians by treaties, and the laws regulating commerce with them, may impose.

§ 154. *If the state has no jurisdiction, or has failed to exercise it, no power accrues to the federal government to assume for that reason jurisdiction over Indian territory within a state.*

But it is not necessary, in determining the question of jurisdiction in this case, to decide whether any or what jurisdiction may be exercised by the state of Tennessee over the Cherokee country within her limits. If the state has no jurisdiction, or has failed to exercise it, it does not follow that the federal government has a general and unlimited jurisdiction over the territory; for its powers are delegated, and cannot be assumed to supply any defect of power on the part of the state.

It is clear that the state of Tennessee, either by failing to exercise jurisdiction or by positive enactment, short of a cession of jurisdiction for purposes specified in the constitution, can neither enlarge nor diminish the powers of congress on the subject. The state of New York, for many years, has punished its citizens for crimes committed in the Indian territory within its limits; and the state of Georgia, before its laws were extended over the Cherokee country within the state, punished its own citizens for offenses committed within that territory; and we are not aware that the right of either state to do this has been questioned.

It is not pretended that any provision by treaty, between the Cherokee nation and the federal government, has been made to embrace a case like the present; or that the treaty-making power can be thus exercised. The connection which exists by treaty between the Indian tribes and the federal government is of a political character; and the enforcement of such stipulations must mainly depend on the executive power.

There is nothing, therefore, in the treaties referred to, which can give to this court jurisdiction of the offense charged in the indictment. This prosecution cannot be sustained, except upon the ground that congress may exercise the same general and exclusive jurisdiction over the Cherokee country as over a territory of the United States. In this view, if one citizen commit a depredation upon the property of another, or do violence to his person, within the boundaries of the Indian lands within a state, he may be arrested and punished under the act of congress. Indeed it would be difficult to pre-

scribe any limit to this legislative power, if it may be extended beyond the objects for which it was given.

It is insisted that the word "commerce," as used in the constitution, is not necessarily limited to the purposes of trade; but may well be construed to embrace every species of intercourse which the federal government may think proper to establish with our Indian nations. That the word "commerce" does refer to trade would seem to be clear from its being used in the same sentence in reference to foreign nations; but it is admitted that the "power to regulate commerce with the Indian tribes" confers on congress the right of selecting such means as may be necessary to attain the object of the power. But these means must have a direct relation to the object.

§ 155. *Limits of the power of congress in relation to Indians.*

Congress have power to establish postoffices and post-roads; consequently, they have power to protect the mail of United States, by providing for the punishment of those who violate it. They have power to coin money, and they may provide for the punishment of those who shall counterfeit the coin. They have power to regulate commerce with the Indian tribes; consequently, they may provide by law in what manner this intercourse shall be carried on, and impose penal sanctions for a violation of the law. But may they, by reason of this special power, assume a general jurisdiction and prescribe for the punishment of all offenses? If this may be done under the power to regulate commerce with the Indian tribes, why may it not be done in all other cases where a limited power is exercised by congress to effectuate a special object.

Congress have power to regulate commerce among the several states; and if the same power, given in the same words, in relation to the Indians, may be exercised as contended, why may not congress legislate on crimes for the states generally? That congress have not this general power is a proposition too clear for demonstration. The thing itself is so palpable that it is susceptible of no illustration. Who would attempt, after reading the federal constitution, to prove by any course of argument that this is a limited government? The very instrument that gives existence to the government imposes the limitations.

And is it not equally clear, that, where a special jurisdiction has been given to congress, a general one cannot be exercised? Is not the jurisdiction under consideration special? Does it not relate exclusively to the regulation of commerce with the Indian tribes? And does not the act in question provide for the punishment of a crime committed by one citizen upon another, wholly disconnected from any intercourse with the Indians? If this be a constitutional provision, the jurisdiction by congress for the punishment of offenses in the Indian country, within the boundaries of any state, is without limit. Believing that in the passage of this provision of the act of 1817, congress have transcended their constitutional powers, I feel bound to say so, and consider this part of the act as having no force or effect.

§ 156. *Jurisdiction of the federal courts.*—Under a treaty entered into in 1868 between the United States and Ute Indians, a certain reservation of land was made in the territory of Colorado for the use of that tribe, the government reserving to itself the police power over such district. The act of March, 1875 (18 U. S. Stats. at Large, 474), admitting Colorado as a state, contained no language that expressly or by necessary implication repealed the reserving clause in the treaty. Hence the jurisdiction of a murder committed in the Ute reservation was in the federal court of the district of Colorado. *United States v. Berry*, 2 McC., 58.

§ 157. A crime having been committed in the Indian country west of Arkansas, prior to its annexation to the Arkansas judicial district, by the act of June 17, 1844 (10 U. S. Stats. at Large, 588), the United States circuit court had no jurisdiction of it. *United States v. Ivy*, Hemp., 562.

§ 158. The prisoner was indicted for a murder committed in the Indian country west of Arkansas. Under the act of congress establishing the district court of Arkansas, that tribunal was given "the same powers that are given to the Kentucky district court" by the act of 1789. That act gave the Kentucky court no jurisdiction of any matters arising outside of Kentucky. *Held*, that the Arkansas court had no jurisdiction of the crime. *United States v. Ta-wan-ga-ca*, Hemp., 304.

§ 159. The act of June 17, 1844, conferred on the federal court of Arkansas jurisdiction to try, determine and punish all crimes within the Indian country west of Arkansas. The murder in question occurred prior to the passage of that act. *Held*, that as there was nothing in the act giving rise to the inference that it was intended to have a retroactive effect, the presumption as to its operation was confined to the future. Hence, the court lacked jurisdiction. *United States v. Starr*, Hemp., 469.

§ 160. The prisoner, an Indian, was indicted for murder of a white man in the Indian country west of Arkansas. All the statutory enactments of the United States, regulative of conduct on the frontiers, fail to comprehend and provide for the punishment of the murder of a white man by an Indian, and, in the absence of such provision it was held that the federal courts had no jurisdiction of such crimes. *United States v. Alberty*, Hemp., 444.

§ 161. After the annexation of the Indian country lying west of Arkansas to the jurisdiction of the federal court of that state, an indictment was found against defendant, in the circuit court, for murder committed in that territory. Before the defendant was captured, however, another act was passed (March 3, 1851) dividing Arkansas into two judicial districts, the Indian country being annexed to the new district or western. *Held*, that the change did not affect the jurisdiction of the circuit court sitting in the eastern district, as to cases pending at the time of the passage of the act, and that the trial would take place where the indictment was found. *United States v. Dawson*, 15 How., 467.

§ 162. Congress has the constitutional right to confer jurisdiction upon the federal courts of offenses by tribal Indians against citizens of the United States. *United States v. Cha-to-kah-na-pe-sha*,\* Hemp., 27.

§ 163. Powers of the states.—The legislature of New York passed an act making it unlawful for any persons other than Indians to settle and reside on the reservations of any Indian tribe, and providing for the summary removal of such intruders. *Held*, that said statute was a police regulation for the protection of the Indians, and that the power of the state to make such regulations was absolute, and hence the act was not repugnant to the federal constitution. Neither did it conflict with any act of congress, there being no law passed by that body authorizing white men to intrude on the possession of Indians. *New York v. Dibble*, 21 How., 366.

§ 164. An Indian reservation within a state is not foreign jurisdiction. The state may exercise a jurisdiction over the territory which shall not be incompatible with the constitutional regulations of the federal government. *United States v. Cisna*,\* 1 McL., 254.

§ 165. In 1858 Minnesota was admitted as a state on an equal footing with the original states. In 1863 the United States entered into a treaty with the Chippewa Indians, and ceded to them certain lands situate in Minnesota, at the same time extending the provisions of the intercourse act, prohibiting the sale of spirituous liquors in the Indian country, to said ceded territory. A seizure having been made for a violation of that act, it was held that the general government did not have the power to stipulate away by treaty any part of the sovereignty of the state, and that the assent of Minnesota was necessary to give force and operation to the provisions of said act. *United States v. Forty-three Gallons of Whisky*, 19 Int. Rev. Rec., 158. See §§ 194-199.

§ 166. Where Indians maintain tribal relations, their property is not subject to the laws of the state within which they may live, or their estates to be administered upon in a probate court of the state unless by express assent of the general government. *United States v. Payne*,\* 4 Dill., 387.

§ 167. Under the treaty of 1867 with the Pottawatomie Indians, the probate courts of Kansas had jurisdiction over the estates of Indians who were dead, but not the estate of one who was alive. So money belonging to an Indian who was alive, which was paid by the United States to an administrator of his estate, may be recovered by the United States from the administrator. *Ibid*.

§ 168. The state of Ohio, in 1835, had full jurisdiction to punish offenses committed by its citizens within the Wyandot reservation in that state. *United States v. Cisna*,\* 1 McL., 254.

§ 169. Indian by marriage.—By the treaty between the government and the Choctaw Indians it is provided that every white person intermarrying with a Choctaw and residing in that

nation shall be to all intents a Choctaw and subject to the jurisdiction of the courts of that nation. The defendant, a white man and a Choctaw by marriage, murdered another person, who, it was claimed, was of the same *status*. But the evidence showed that the victim's wife, although possessed of Indian blood, was born in Mississippi, and that her paternal grandfather was a full-blooded white man, and a citizen of that state. *Held*, that the murdered man was not within the purview of the provisions of the treaty, and that consequently the defendant was subject to the federal jurisdiction. *Ex parte Reynolds*, 18 Alb. L. J., 8. See §§ 142-47.

§ 170. Indians are not foreign citizens or subjects within the meaning of the constitution, and the participation of a member of a tribe in a suit will not give a federal court jurisdiction of the cause under section 11 of the judiciary act, on that ground. *Karrahoo v. Adams*, 1 Dill., 844. See § 189.

§ 171. When members of an Indian tribe scatter themselves among the citizens of the United States and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States, and equally with the citizens thereof subject to the jurisdiction of its courts. *Ex parte Reynolds*, 18 Alb. L. J., 8. See §§ 142-47.

§ 172. The common law rule of heredity as applicable to the offspring of free persons, *partus sequitur patrem*, prevails in this country. Hence where the grandfather of the proponent was a white man residing in the state of Mississippi, and not with an Indian tribe, a citizen of that state and of the United States, she, the proponent, although possessed of Indian blood, followed his condition and was a citizen of the United States, and subject to the jurisdiction of its courts. *Ibid*.

§ 173. Where a member of a tribe of Indians leaves his people, and merges himself in the general mass of citizens, he owes allegiance to the federal government, and to the state wherein he resides, and becomes subject to the jurisdiction of both federal and state courts. *Ex parte Kenyon*, 5 Dill., 385.

§ 174. Reservations.—In pursuance of a treaty made with the United States in 1842, providing for the removal of the Indians, the Seneca tribe conveyed by indenture set forth in said treaty a tract of land in New York to certain white men, the grant being confirmed by Massachusetts under the provisions of the act of cession made between that state and New York in 1786. The consideration for the land having been paid, possession was taken by virtue of the treaty. Prior to this, in 1821, an act was passed in New York forbidding the settlement upon Indian reservations of any persons but Indians. *Held*, that said treaty was not in conflict with the statute of 1821, but that it would afford no protection to the grantees under it until the Indians had been removed by the government, unless there was a right of entry given by it. *New York v. Dibble*, 21 How., 366.

§ 175. The Indian country is within the jurisdiction of the United States, and congress may extend all laws within the constitutional limits of municipal legislation over the same; and under section 107 of the internal revenue act of July 20, 1863, the internal revenue laws of the United States are in full force in such country. *United States v. Tobacco Factory*,\* 1 Dill., 264.

§ 176. Where congress has undertaken to legislate with reference to crimes committed in the Indian country its jurisdiction is exclusive, and the tribunals of an Indian nation have no jurisdiction. *United States v. Ragsdale*,\* Hemp., 497.

§ 177. White man adopted into Indian tribe.—The defendant, a white man, was indicted for killing another white man, on the Cherokee reservation. His defense was that, having voluntarily surrendered his citizenship and joined the Indian tribe, he was not subject to the laws of the United States but to those of the Cherokee nation only. *Held*, that he was not an Indian within the intent of section 5 of the treaty with the Cherokees, made in 1835, and that the plea was invalid. *United States v. Rogers*, Hemp., 450; 4 How., 567.

§ 178. A white man who merges himself with the Chickasaw or Choctaw Indians and becomes one of them by adoption still remains liable to the federal government for crimes committed by him in the "Indian country," and the federal courts have proper jurisdiction to try him, as provided by the acts of June 8, 1834, and June 17, 1844. Jurisdiction of the Courts of the Choctaw Nation,\* 7 Op. Att'y Gen'l, 174.

§ 179. The country occupied by the Choctaw Indians being within the territorial limits of the United States, and the sovereignty of the United States having been only partially relinquished, white citizens of the United States, or other white citizens owing allegiance to them, cannot divest themselves of that allegiance by a residence among the Choctaw Indians, nor by becoming members by adoption of the nation. Jurisdiction of the Choctaw Courts,\* 2 Op. Att'y Gen'l, 693.

§ 180. By the second article of the treaty of Washington of August 6, 1846, with the Cherokee Indians, a murder committed by an Indian of a white man adopted into the tribe was fully and absolutely pardoned. *United States v. Ragsdale*,\* Hemp., 497.



§ 181. **Right to writ of habeas corpus.**—An Indian is a *person* within the meaning of the laws of the United States and has the right to sue out a writ of *habeas corpus* in a federal court, or before a federal judge, in all cases where he may be confined or in custody, under color of authority of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States. *United States v. Crook*,\* 5 Dill., 453.

§ 182. A writ of *habeas corpus* issuing out of the United States circuit court for the western district will run in the Indian country, that territory being within the jurisdiction of said court. *Ex parte Kenyon*, 5 Dill., 385.

§ 183. The courts of the Cherokee nation had no jurisdiction over an individual who, though having "Cherokee blood in his veins," was a citizen of Georgia, and who committed murder while residing within the limits of the Cherokee nation, in pursuance of a license granted to him by the government for the purpose of trading; he was amenable solely to the laws of the United States. Jurisdiction of the United States over the Case of Rogers,\* 4 Op. Att'y Gen'l, 258.

§ 184. The courts of the Choctaw nation have jurisdiction of a civil action, one of the parties to which is a white man, who has become a Chickasaw by marriage and adoption, where the subject-matter of the controversy is the proceeds of a sale of certain reservations of land granted to him by that nation. Jurisdiction of the Courts of the Choctaw Nation,\* 7 Op. Att'y Gen'l, 174.

§ 185. The Choctaw nation had no authority nor jurisdiction, either under the treaty of September 27, 1830, or the act of June, 1834, to pronounce and execute a sentence of death upon the slave belonging to a white resident among them, their jurisdiction being limited by the treaty to the government of the "Choctaw nation of red people and their descendants." Jurisdiction of the Choctaw Courts,\* 2 Op. Att'y Gen'l, 693.

§ 186. **Kansas.**—The act of June, 1834, gave jurisdiction to the federal courts of all crimes committed against the laws of the United States within any Indian reservation. But the act of 1861, admitting Kansas upon an equal footing with the original states, annulled the federal jurisdiction in that state, except as to certain territory held by the Indians under treaty with the government. Hence, the jurisdiction of the Kansas court over a murder committed on a reservation not within the exception is undisputed, and the federal court cannot take cognizance of the crime. *United States v. Ward, Woolw.*, 17.

§ 187. **Oregon.**—By the act of June, 1850 (9 U. S. Stats. at Large, 437), the provisions of the intercourse act of 1834 were extended over Oregon, as far as they were applicable. *Held*, that the provision providing for the punishment, by the federal authorities, of a white man for stealing the property of an Indian, was applicable, and was not affected by the subsequent act of 1859, admitting Oregon as a state. *United States v. Bridleman*, 7 Saw., 248.

§ 188. The treaty of June, 1855, between the United States and the Umatilla Indians, in Oregon, by which a tract of land was ceded to the latter for their exclusive use, constituted the said territory "Indian country," and extended the federal jurisdiction therein to all crimes prohibited by the intercourse act of 1834 and its amendments. And the admission of Oregon into the Union, in 1859, did not have the effect of abrogating or modifying said treaty. *Ibid*.

§ 189. A trial for homicide committed on an Indian reservation must be had on the federal side of a territorial court, and is governed by the United States statutes and the rules of the common law. *McCall v. United States*,\* 1 Dak. Ty, 320.

### III. REGULATION OF TRADE AND INTERCOURSE.

**SUMMARY**—*Power of congress; introduction of liquor into territory adjacent to Indian country*, § 190.—*Lands situated within a state*, § 191.—*Sale of liquor within a state, and not on a reservation*, §§ 192, 193.

§ 190. The power of congress under the constitution to regulate commerce with Indian tribes is in its nature general, and not confined to any locality. Its existence necessarily implies the right to exercise it whenever there is a subject to act upon, although within the limits of a state, and it extends to the regulation of commerce with individual members of the tribe. Congress has the right to prohibit the introduction of spirituous liquors into territory adjacent to the Indian country, though such territory is within a state. *United States v. Forty three Gallons of Whisky*, §§ 194-99.

§ 191. The reservation in the seventh section of the treaty of October 3, 1863, with the Red Lake and Pembina band of Chippewa Indians, that the laws of the United States relating to the introduction of spirituous liquors into their country should remain in force in that part thereof ceded by that treaty, is valid, though the lands were situated within the state of Min-

nesota, and liquors introduced into such territory are liable to forfeiture under the laws of the United States, the subject-matter being one not within state jurisdiction. *Ibid.*

§ 192. Under the intercourse law of June 30, 1834, as amended by the twentieth section of the act of February 13, 1862, the sale of liquor to an Indian under the charge of an Indian agent or superintendent is penal, though the sale was made within the limits of a state and off the reservation, and such Indians cannot be withdrawn from the operation of the law by the constitution or laws of such state. *United States v. Holliday*, §§ 200-204.

§ 193. Congress, under its constitutional power to regulate commerce with the Indian tribes, may forbid the sale of liquors to Indians maintaining tribal relations wherever such sale may be made, though within the limits of a state to Indians resident within it, and no law or constitutional provision of such state relating to the *status* of such Indians can abridge or impair such right. *Ibid.*

[NOTES.— See §§ 205-238.]

#### UNITED STATES *v.* FORTY-THREE GALLONS OF WHISKY.

(3 Otto, 188-193. 1876.)

ERROR to U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.— A libel was filed against the whisky as introduced into a region in close proximity to an Indian reservation. The owner appeared, claimed the whisky, and demurred to the libel on the ground that the whisky was seized within the jurisdiction of the state of Minnesota and not in any region exclusively within the jurisdiction of the United States. The demurrer was sustained and the libel dismissed. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE DAVIS.

It may be that the policy of the government on the subject of Indian affairs has, in some particulars, justly provoked criticism; but it cannot be said that there has not been proper effort, by legislation and treaty, to secure Indian communities against the debasing influence of spirituous liquors. The evils from this source were felt at an early day, and, in order to promote the welfare of the Indians, as well as our political interests, laws were passed and treaties framed restricting the introduction of liquor among them. That these laws and treaties have not always secured the desired result is owing more to the force of circumstances which the government could not control, than to any unwillingness to execute them.

Traffic with Indians is so profitable that white men are constantly encroaching on Indian territory to engage in it. The difficulty of preventing this intrusion, and of procuring convictions for offenses committed on the confines of civilization, are the obstacles in the way of carrying into effect the intercourse laws. It is doubtless true that they are as well executed as could be expected under the circumstances. In this case the United States, in its endeavors to enforce them, is met with the objection that they do not apply to the country in which the liquor was seized.

§ 194. *Treaty with the Pembina Indians.*

The Red Lake and Pembina band of Chippewa Indians ceded to the United States, by treaty concluded October 2, 1863, a portion of the lands occupied by them, reserving enough for their own use. The seventh article is in these words: "The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded until otherwise directed by congress or the president of the United States." The ceded country is now part of an organized county of the state

of Minnesota; and the question is, whether the incorporation of this article in the treaty was a rightful exercise of power. If it was, then the proceedings to seize and libel the property introduced for sale in contravention of the treaty were proper, and must be sustained.

Few of the recorded decisions of this court are of greater interest and importance than those pronounced in *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1 (§§ 111-38, *supra*); and *Worcester v. The State of Georgia*, 6 Pet., 515 (§§ 12-52, *supra*). Chief Justice Marshall, in these cases, with a force of reasoning and an extent of learning rarely equaled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived; and his exposition was based on the power to make treaties and regulate commerce with the Indian tribes. Under the articles of confederation the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of a state within its own limits be not infringed or violated. Of necessity these limitations rendered the power of no practical value. This was seen by the convention which framed the constitution, and congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this, and the history of the country shows the necessity of keeping them “separate, subordinate and dependent.” Accordingly, treaties have been made and laws passed separating Indian territory from that of the states, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States. Congress very early passed laws relating to the subject of Indian commerce, which were from time to time modified by the lessons of experience.

The act of June 30, 1834 (4 Stat., 732), as amended by the act of March 15, 1864 (13 Stat., 29), is the one now in force on this subject. It defines what shall be deemed Indian country, directs the manner in which trade and intercourse with the Indians shall be carried on, and forbids any one, under certain penalties, to give or sell liquor to an Indian in charge of an agent, or to introduce it into the Indian country.

§ 195. *The power of congress to regulate commerce with the Indians is general and not confined to any particular locality.*

In *United States v. Holliday*, 3 Wall., 409 (§§ 200-204, *infra*), the power of congress to pass the act of 1864 was the main point in controversy. Holliday was indicted for selling liquor in Gratiot county, Mich., to an Indian in charge of an agent. The county was not Indian country, nor did it even have an Indian reservation in it. It was contended, among other things, that the sale of liquor to an Indian, or any other person within the county, was a matter of state regulation, with which congress had nothing to do. But this court held that the power to regulate commerce with the Indian tribes was, in its nature, general, and not confined to any locality; that its existence necessarily implied the right to exercise it whenever there was a subject to act upon, although within the limits of a state, and that it extended to the regulation of commerce with the individual members of such tribes. It was also contended that the intercourse act was not a regulation of commerce within the meaning of the constitution, but the court held otherwise, and said: “It

(the act) relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one."

§ 196. *Congress has the power to prohibit the introduction of spirits into places adjacent to Indian reservations.*

The power is in no wise affected by the magnitude of the traffic or the extent of the intercourse. As long as these Indians remain a distinct people, with an existing tribal organization recognized by the political department of the government, congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it; and why cannot congress forbid its introduction into a place near by, which they would be likely to frequent? It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it; and that bad white men, knowing this, would carry on the traffic in adjoining localities rather than venture upon forbidden ground. If congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction, and as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well being, would require us to impose further legislative restrictions, should country adjacent to their reservations be used to carry on the liquor traffic with them.

§ 197. *Power to prescribe and enlarge boundary of Indian country.*

The Indian country, as defined by the act of 1834, was at that date so remote from settlements that there was no occasion to extend the prohibition beyond its limits. It has since then been so narrowed by successive treaties that the white population is now all around it, and regarding it with a wistful eye. In view of this changed condition it would be strange, indeed, if the commercial power, lodged solely with congress and unrestricted as it is by state lines, did not extend to the exclusion of spirituous liquors intended to corrupt the Indians, not only from existing Indian country, but from that which has ceased to be so, by reason of its cession to the United States. The power to define originally the "Indian country," within which the unlicensed introduction and sale of liquors were prohibited, necessarily includes that of enlarging the prohibited boundaries, whenever, in the opinion of congress, the interests of Indian intercourse and trade will be best subserved.

It is true, congress has not done this; but the constitution declares a treaty to be the supreme law of the land; and Chief Justice Marshall, in *Foster v. Neilson*, 2 Pet., 314, has said: "That a treaty is to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision." No legislation is required to put the seventh article in force, and it must become a rule of action, if the contracting parties had power to incorporate it in the treaty of 1863. About this there would seem to be no doubt. From the commencement of its existence the United States has negotiated with the Indians in their tribal condition as nations, dependent, it is true, but still capable of making treaties. This was only following the practice of Great Britain before the Revolution. In *Worcester v. The State of Georgia*, *supra*, the court say: "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legis-

lative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to the Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense."

In consequence of this interpretation, a country which, if left to the Indians, would have remained a wilderness, is now occupied by farms, towns and cities. The only legitimate way to accomplish this beneficent result was by extinguishing the Indian title; and the subject-matter of this treaty is the cession of a large tract of land in the state of Minnesota and the territory of Dakota. Indeed, the acquisition of territory has been the moving cause of all Indian treaties, and will continue to be so until Indian reservations are confined to very narrow limits. It is admitted that these had the same right as other tribes to occupy their lands as long as they pleased, and that this right could only be extinguished by voluntary cession to the government. If so, why not annex to the cession a condition deemed valuable to them and beneficial to the United States, as tending to keep the peace on the frontiers?

The chiefs doubtless saw, from the curtailment of their reservation and the consequent restriction of the limits of the "Indian country," that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew that, if there was no cession, they were already sufficiently protected by the extent of their reservation.

§ 198. *As congress has the power over commerce with Indian tribes everywhere, there can be no question of state jurisdiction.*

Under such circumstances, it was natural that they should be unwilling to sell, until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by congress or the president. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with other states. The principle that federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the states, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without state lines. Based as it is exclusively on the federal authority over the *subject-matter*, there is no disturbance of the principle of state equality.

§ 199. *Power to make treaties with Indian tribes.*

Besides, the power to make treaties with the Indian tribes is, as we have seen, co-extensive with that to make treaties with foreign nations. In regard to the latter it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right as to take and hold such property as if they were natives of this country, it might contravene the statutes of a state; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. If this result can be thus obtained, surely the federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question,

coming, as it fairly does, within the clause relating to the regulation of commerce.

Minnesota, instead of being injured, is benefited. An immense tract of valuable country formerly withheld from her civil jurisdiction is subjected to it, and her wealth and power greatly increased. Traversed by railroads that were built, in part at least, with lands which this treaty enabled congress to grant, the country is open to sale and pre-emption and homestead settlement, and will soon be occupied by a hardy and industrious people. The general government asks, in return for this, that the ceded territory shall retain its original *status*, so far as the introduction within it of spirituous liquors and the sale of them to the Pembina Indians are concerned.

It would seem, apart from the question of power, that the price paid by the state bears no proportion to the substantial and enduring benefits conferred upon her; and we are happy to say, that her officers are not engaged in making this defense. Judgment reversed, and record remanded with directions to overrule the demurrer and try the case.

UNITED STATES *v.* HOLLIDAY—SAME *v.* HAAS.

(8 Wallace, 407-420. 1865.)

**STATEMENT OF FACTS.**—Separate indictments were found against Holliday and Haas, in the district courts of Michigan and Minnesota, for selling liquor to Indians in violation of the act of congress (12 Stats. at Large, 339). The indictments were transferred to the circuit courts. The cases came up upon certificates of division of opinion from the circuit courts of Minnesota and Michigan respectively.

Opinion by MR. JUSTICE MILLER.

The questions propounded to this court in the two cases have a close relation to each other, and will be disposed of in one opinion. The first question on which the judges divided in the case against Haas is, "whether, under the act of February 13, 1862, the offense for which the defendant is indicted was one of which the circuit court could have original jurisdiction."

§ 200. *The offense of selling liquor to Indians under the act of congress is cognizable in the circuit as well as the district courts.*

Previous to the act of July 15, 1862, no circuit courts existed in the districts of Texas, Florida, Wisconsin, Minnesota, Iowa and Kansas, but the district courts in those districts exercised the powers of circuit courts. It was during this time that Haas was indicted and convicted; and a motion in arrest of judgment was pending and undetermined when that act went into effect. That act, by its own terms, transferred to the circuit courts which it created — one of which was in the district of Minnesota — all causes, civil or criminal, which might have been brought, and could have been originally cognizable in, a circuit court. If, then, the offense for which Haas was indicted was one which could have been originally cognizable in a circuit court, it was properly in that court for final determination; otherwise it was not.

The act under which the indictment was found says that, if any person shall commit the offense therein described, "such person shall, on conviction before the proper district court of the United States, be imprisoned," etc. So far as the act itself provides a court for its enforcement it is the district court, and not the circuit court.

An examination, however, of the several acts which define generally the relative jurisdiction of the district and circuit courts of the United States, leaves no doubt that, in regard to all crimes and offenses, it was intended to make the jurisdiction concurrent, except in cases where the punishment is death. In that class of offenses the jurisdiction is exclusive in the circuit courts. The present offense, however, is created after all of those acts were passed, and the law defining it only confers jurisdiction on the district court. Can the statutes, or any of them which give the circuit courts concurrent jurisdiction of offenses cognizable in the district courts, be held to have a prospective operation in such case as the present?

The twelfth section of the judiciary act, which created both the circuit and district courts, says of the former, they "shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein." This provision has distinct reference in its first clause to cases of which the circuit courts shall have exclusive jurisdiction, and, in its latter clause, to cases in which they shall have concurrent jurisdiction with the district courts. The former include all crimes and offenses where some statute does not provide the contrary. The latter include all crimes and offenses cognizable in the district courts.

The judiciary act of 1789, of which these provisions constitute a part, is the one which, for the first time under our federal constitution, created the courts which were to exercise the judicial function of the government. The powers conferred by that act on the several courts which it created, and the lines by which it divided the powers of those courts from each other, and limited the powers of all of them under the constitution, were intended to provide a general system for the administration of such powers as the constitution authorized the federal courts to exercise. The wisdom and forethought with which it was drawn have been the admiration of succeeding generations. And so well was it done that it remains to the present day, with a few unimportant changes, the foundation of our system of judicature, and the law which confers, governs, controls and limits the powers of all the federal courts, except the supreme court, and which largely regulates the exercise of its powers.

It cannot be supposed, under these circumstances, that in giving to the circuit courts jurisdiction of all crimes and offenses cognizable in the district courts, it was intended to limit the grant to such cases as were then cognizable in those courts. In fact, there was, at the time this statute was passed, no such thing as an offense against the United States, unless it was treason, as defined in the constitution. It has been decided that no common law crime or offense is cognizable in the federal courts. The judiciary act organizing the courts was passed before there was any statute defining or punishing any offense under authority of the United States. This clause, then, giving the circuit courts concurrent jurisdiction in all cases of crime cognizable in the district courts, must, of necessity, have had reference to such statutes as should thereafter define offenses to be punished in the district courts. The offense, then, for which Haas was indicted, although declared by that act to be cognizable in the district courts, was by virtue of the act of 1789 also cognizable in the circuit courts.

§ 201. *The act of selling liquor to an Indian within the limits of a state is an offense cognizable under the act of congress by United States courts.*

The second question in that case is this: Whether, under the facts above stated, any court of the United States had jurisdiction of the offense? The facts referred to are, concisely, that spirituous liquor was sold within the territorial limits of the state of Minnesota and without any Indian reservation, to an Indian of the Winnebago tribe, under the charge of the United States Indian agent for said tribe.

It is denied by the defendant that the act of congress was intended to apply to such a case; and, if it was, it is denied that it can be so applied under the constitution of the United States. On the first proposition the ground taken is, that the policy of the act, and its reasonable construction, limit its operation to the Indian country, or to reservations inhabited by Indian tribes. The policy of the act is the protection of those Indians who are, by treaty or otherwise, under the pupilage of the government, from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison, when they are outside of a reservation, as well as within it. The evil effects are the same in both cases.

But the act of 1862 is an amendment to the twentieth section of the act of June 30, 1834, and, if we observe what the amendment is, all doubt on this question is removed. The first act declared that if any person sold spirituous liquor to an Indian *in the Indian country* he should forfeit \$500. The amended act punishes any person who shall sell to an Indian under charge of an Indian agent, or superintendent, appointed by the United States. The limitation to the Indian country is stricken out, and that requiring the Indian to be under charge of an agent or superintendent is substituted. It cannot be doubted that the purpose of the amendment was to remove the restriction of the act to the Indian country, and to make parties liable if they sold to Indians under the charge of a superintendent or agent, wherever they might be.

§ 202. *The act prescribing a punishment for selling liquor to Indians is constitutional.*

It is next asserted that if the act be so construed it is without any constitutional authority in its application to the case before us. We are not furnished with any argument by either of the defendants on this branch of the subject, and may not therefore be able to state with entire accuracy the position assumed. But we understand it to be substantially this: that so far as the act is intended to operate as a police regulation to enforce good morals within the limits of a state of the Union, that power belongs exclusively to the state, and there is no warrant in the constitution for its exercise by congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the state, among its own inhabitants or citizens, and is not within the powers conferred on congress by the commercial clause.

The act in question, although it may partake of some of the qualities of those acts passed by state legislatures, which have been referred to the police powers of the states, is, we think, still more clearly entitled to be called a regulation of commerce. "Commerce," says Chief Justice Marshall, in the opinion in *Gibbons v. Ogden* (Constr., §§ 1183-1201), to which we so often turn with profit when this clause of the constitution is under consideration, "commerce undoubtedly is traffic, but it is something more; it is intercourse." The



law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

If the act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of congress by the constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision.

Is there anything in the fact that this power is to be exercised within the limits of a state which renders the act regulating it unconstitutional? In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign states, says, "The power does not stop at the jurisdictional limits of the several states. It would be a very useless power if it could not pass those lines." "If congress has power to regulate it, that power must be exercised wherever the subject exists." It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by congress, although within the limits of a state. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the constitution authorizes congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the Indian tribes.

These views answer the two questions certified up in the case against Haas, and the two first questions in the case against Holliday.

§ 203. *An Indian who lives among his people and receives an annuity is under the charge of an Indian agent, though he has a piece of land and votes.*

The third question in Holliday's case is, whether, under the circumstances stated in the plea and replication, the Indian named can be considered as under the charge of an Indian agent, within the meaning of the act?

The substance of the facts as set out in those pleadings is, that the Indian to whom the liquor was sold had a piece of land on which he lived, and that he voted in county and town elections in Michigan, as he was authorized to do by the laws of that state; that he was still, however, so far connected with his tribe that he lived among them, received his annuity under the treaty with the United States, and was represented in that matter by the chiefs or head men of his tribe, who received it for him; and that an agent of the government attended to this and other matters for that tribe. These are the substantial facts pleaded on both sides in this particular question, and admitted to be true; and without elaborating the matter we are of opinion that they

show the Indian to be still a member of his tribe, and under the charge of an Indian agent. Some point is made of the dissolution of the tribe by the treaty of August 2, 1855; but that treaty requires the tribal relation to continue until 1865, for certain purposes, and those purposes are such that the tribe is under the charge of an Indian superintendent, and they justify the application of the act of 1862 to the individuals of that tribe.

Two other questions are propounded by the judges of the circuit court for the eastern district of Michigan, both of which have relation to the effect of the constitution of Michigan and certain acts of the legislature of that state, in withdrawing these Indians from the influence of the act of 1862.

§ 204. *If the political authorities recognize certain Indians as a tribe, this court also considers them in that light.*

The facts in the case certified up with the division of opinion show distinctly "that the secretary of the interior and the commissioner of Indian affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the constitution of the United States, they are placed, for certain purposes, within the control of the laws of congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority.

Neither the constitution of the state nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the state the supreme law of the land, instead of the constitution of the United States, and the laws and treaties made in pursuance thereof. If authority for this proposition, in its application to the Indians, is needed, it may be found in the cases of *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1 (§§ 111-38, *supra*), and *Worcester v. The State of Georgia*, 6 Pet., 515 (§§ 12-52, *supra*).

The results to which we arrive from this examination of the law, as regards the questions certified to us, is that both questions in the case against Haas must be answered in the affirmative; and in the case against Holliday, the first three must be answered in the affirmative, and the last two in the negative. It is, however, proper to say, that in the fourth question in the latter case is included a query whether the Indian, Otubsko, was a citizen of the state of Michigan. As the views which we have advanced render this proposition immaterial to the decision of the case, the court is to be understood as expressing no opinion upon it.

§ 205. *In general.*—No citizen of the United States, by entering an Indian territory within the government limits and becoming one of them by adoption, can claim to be exempt from the laws of the United States which regulate intercourse with the Indians. Trade with the Cherokees,\* 2 Op. Att'y Gen'l, 402.

§ 206. *Power of congress.*—Under the power to regulate commerce with Indian tribes, congress may enact laws of the same character and scope as those enacted by it in reference

to foreign nations. It may prohibit trade with the Indians without a license. *United States v. Cisna*,\* 1 McL., 254.

§ 207. The power to regulate commerce among the Indian tribes is vested exclusively in congress. *Worcester v. Georgia*, 6 Pet., 515 (§§ 12-52).

§ 208. Congress has the power to legislate upon the subject of intercourse with the Indian tribes wherever they exist, irrespective of state lines or governments. *United States v. Bridleman*, 7 Saw., 243.

§ 209. *Indian country*.—The question arose as to whether all that part of the United States west of the Mississippi and not within the states of Missouri, Arkansas or Louisiana was, for the purposes of the intercourse act of 1834 and amendments, to be considered as Indian country, and it was held that when territory has been ceded by the Indians to the United States it has never afterwards been considered or treated as Indian country for any purpose. Hence only that portion of the territory in question that has not been ceded to the government can be deemed Indian country. *Clark v. Bates*,\* 1 Dak. T'y, 42.

§ 210. Alaska is not Indian country except so far as the introduction and disposition of intoxicating liquors is concerned, and no license is required for trade there even with Indians. *Waters v. Campbell*,\* 4 Saw., 121.

§ 211. The act of March, 1873 (17 U. S. Stat. at Large, 530), amending the act of July, 1868 (15 U. S. Stat. at Large, 240), extended sections 20 and 21 of the Indian intercourse act of 1834 so as to include Alaska within the term "Indian country," for the purpose of preventing the introduction and disposition of spirituous liquors therein, and the military force of the government may be employed by the president for arresting violators of said section in that territory. *In re Carr*, 8 Saw., 316.

§ 212. Alaska, having been acquired subsequently to the passage of the Indian intercourse act of 1834 (4 U. S. Stat. at Large, 729), was held not to be included in the territory known as the "Indian country," therein defined, nor did the act of July, 1868, extend the previous act so as to include Alaska. Hence, an indictment for introducing spirituous liquors into that territory in contravention of the act of 1834 will not lie. *United States v. Seveloff*, 2 Saw., 311.

§ 213. Neither the territory nor state of Nevada became Indian country, either by virtue of the intercourse act of 1834, or the act of 1856 extending the provisions of the laws relating to trade and intercourse with the Indians over the Indian tribes of New Mexico and Utah. *United States v. Leathers*,\* 6 Saw., 17.

§ 214. The term "Indian country," within the meaning of the intercourse act of June, 1834, amended by the act of March, 1864 (13 U. S. Stat. at Large, 29), was held to include all lands to which the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. *Bates v. Clark*, 10 Ch. Leg. N., 227; 5 Otto, 204.

§ 215. Certain buffalo robes were seized at Camp Cook, Chouteau county, Montana territory, as having been traded for in the Indian country by persons who had no license to trade. Held, that Camp Cook came within the definition of "Indian country," prescribed in 4 United States Statutes at Large, 735, and that the goods were properly seized. *United States v. 196 Buffalo Robes*,\* 1 Mont. T'y, 489.

§ 216. The term "Indian country" is amply defined by the intercourse act of 1834, and does not depend for its significance on the fact that there are no settlements of white men within its limits. *Ibid*.

§ 217. Oregon was not comprehended by the original definition of "Indian country" as laid down in the intercourse act of June, 1834, but by the act of June 5, 1850, the provisions of the former statute were extended to it as far as they were applicable. It was held that the section prohibiting the sale . . . of any spirituous liquors to an Indian were applicable. *United States v. Tom*,\* 1 Or., 26.

§ 218. *Trespass on lands*.—The word "cattle," in section 9 of the act of June 30, 1833, which prohibits the depasturing of Indian lands by "horses, mules or cattle," includes sheep. *United States v. Mattock*,\* 2 Saw., 148.

§ 219. Intruders on an Indian reservation in Kansas may, by virtue of the act of June, 1838, construed in connection with the intercourse act of June, 1834, be removed therefrom by the assistance of the military forces of the government, under the direction of the proper authorities. Removal of Intruders from Indian Reservations,\* 12 Op. Att'y Gen'l, 51.

§ 220. An action for a penalty for a settlement on Indian lands, under section 11 of the intercourse act of June, 1834, will only lie where the title of the Indians is derived from treaty with the United States. Thus, the defendant being sued by the government for making such a settlement on lands belonging to the Pueblo Indians of Cochite, the title to said lands having been derived from the Spanish crown, a demurrer to the declaration was held good. *United States v. Lucero*,\* 1 Ch. Leg. N., 169.

§ 221. The Pyramid Lake Indian reservation having been set apart for the use of Indians, a white man who fishes therein does so contrary to law. *United States v. Sturgeon*, 6 Saw., 29.

§ 222. The question whether the presence of a person on an Indian reservation is detrimental to the welfare of the Indians is left by law to the commissioner of Indian affairs and the secretary of the interior. The courts will not review their decision in the matter. *Ibid.*

§ 223. Selling liquor to Indians.—An Indian is under the charge of an Indian agent within the meaning of the act of congress of March 15, 1864, forbidding the sale of liquors to such Indians, if he still maintains tribal relations and receives his annuity, though he may not have been on the reservation for two years. *United States v. Flynn*,\* 1 Dill., 451.

§ 224. Where ardent spirits are carried into the Indian country by a trader for an unlawful purpose, all the goods of such trader designed for sale under his license and seized within the Indian country are liable to forfeiture, and not merely that part of the goods in contact with the liquor when seized. *American Fur Co. v. United States*,\* 2 Pet., 358.

§ 225. It is not a violation of the act of congress of March 30, 1802, relating to intercourse with the Indian tribes, and of the amendments thereto, to carry ardent spirits into territory purchased of and occupied by the Indians, though not within the boundaries of the Indian country as defined by law. *Ibid.*

§ 226. The word "person," as used in section 20 of the intercourse act of 1834, amended by the act of March 1864 (13 U. S. Stats. at Large, 29), providing for the punishment of "any person" who shall dispose of any spirituous liquor to any Indian, etc., is held to include an Indian. *United States v. Shaw-mux*,\* 5 Ch. Leg. N., 352; 2 Saw., 364.

§ 227. An indictment under that section of the Indian intercourse act of 1834 which provides for the punishment of "every person, except an Indian in the Indian country, who sells . . . any spirituous liquors . . . to any Indian," etc., was held defective for failing to allege that the defendant was not "an Indian in the Indian country." *United States v. Winslow*, 8 Saw., 387.

§ 228. The selling of liquor to an Indian under the act of June, 1834, amended by the act of March, 1864 (13 U. S. Stats. at Large, 29), is not felonious, but constitutes a misdemeanor only. *Bruguier v. United States*,\* 1 Dak. T'y, 5.

§ 229. The intercourse act (4 U. S. Stats. at Large, 735) was not designed to prohibit the transportation of spirituous liquors by citizens of the United States, or those who have declared their intention of becoming such, through the Indian country, where there is no intent to dispose of the same therein contrary to law. And liquors so carried are not liable to seizure. *United States v. Carr*,\* 2 Mont. T'y, 284.

§ 230. Section 2139, Revised Statutes United States, providing for the punishment of "every person, except an Indian in the Indian country, who sells, barter, etc., any spirituous liquors or wines to any Indians," etc., was designed to prevent the introduction of liquor into the Indian country, and its sale there by any one but an Indian, and does not prohibit the sale to an Indian outside of said country. Consequently an indictment for such offense failing to allege that said sale was made in the Indian country was held bad. *United States v. Downing*,\* 8 Cent. L. J., 383.

§ 231. The intent with which intoxicating liquors are introduced into the Indian country, or sold to Indians, is immaterial. *United States v. Leathers*,\* 6 Saw., 17.

§ 232. The act of March 30, 1802, relating to intercourse with Indians, was constitutional. *United States v. Cisna*,\* 1 McL., 254.

§ 233. A seizure of liquors, under section 2140, Revised Statutes, not made within the limits of an Indian reservation, is invalid. *Pelcher v. United States*,\* 3 McC., 510; 11 Fed. R., 47.

§ 234. A license to trade with Indians is of no validity without the approval of the Indian commissioner. *United States v. 193 Buffalo Robes*,\* 1 Mont. T'y, 489.

§ 235. A license to trade with Indians gives a personal privilege to those named therein, which cannot be transferred to others. *Ibid.*

§ 236. The word "person" includes an Indian both in its ordinary signification, and as used in section 20 of the intercourse act of 1834, and the amendatory act of March 15, 1864. *United States v. Shaw-mux*,\* 2 Saw., 364.

§ 237. The Cherokee nation of Indians have no right to impose a tax on persons trading among them, who are duly licensed by the United States for that purpose. *Right of the Cherokees to Impose Taxes on Traders*,\* 1 Op. Att'y Gen'l, 645.

§ 238. Wyandot Indians.—The act of congress of March 30, 1802, relating to the intercourse with Indian tribes had become inoperative as to the Wyandot Indians in Ohio, in 1835, when they had become civilized, and their reservation had become reduced to twelve miles square, and was crossed by roads and constantly frequented by white people, and the courts of the United States had then no jurisdiction over offenses committed by citizens of Ohio on the reservation. *United States v. Cisna*,\* 1 McL., 254.

## IV. TREATIES.

§ 239. Treaties with Indian tribes are treaties within the meaning of the federal constitution, and, as such, are the supreme laws of the land. *Turner v. The American Baptist Missionary Union*, 5 McL., 344.

§ 240. A treaty entered into with an Indian tribe is a law of the United States which it is within the power of congress to repeal; but such repeal can only be enacted in express terms, or by language importing a clear purpose to effect that end. *United States v. Berry*, 2 McL., 58.

§ 241. The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be used only in the latter sense. *Worcester v. Georgia*, 6 Pet., 515 (§§ 12-52, *supra*).

§ 242. Although a treaty is the law of the land, yet under the constitution of the United States congress may abrogate it so far as it is municipal law, provided its subject-matter is within the legislative power of congress. Therefore so much of the tenth article of the treaty of July 19, 1866, between the United States and the Cherokee Indians as is repugnant to the act of congress of July 20, 1868, extending the internal revenue laws of the United States over the Indian country, is abrogated thereby. *United States v. Tobacco Factory*,\* 1 Dill., 264; 13 Int. Rev. Rec., 91.

§ 243. The treaty of October 25, 1805, between the Cherokee Indians and the United States, concerning lands in the state of North Carolina, is a contract between the parties, and its plain terms cannot be varied by the acts of agents of the United States, in erecting buildings and placing a garrison upon lands not conveyed. *Meigs v. McClung*,\* 9 Cr., 11.

§ 244. By the act of May, 1820 (3 Stats. at Large, 489), in force in 1854, Indian treaties newly entered into were required to be published in only one newspaper, and that within the limits of the state or territory to which the subject-matter of the treaty belonged. *Promulgation of Indian Treaties*,\* 6 Op. Att'y Gen'l, 627.

## V. INDIAN AGENTS.

§ 245. Where an Indian agent performed the duties of a commissioner, in negotiating a treaty with the Indians, at the request of the secretary of war, he was held to be entitled to compensation for such extra services. *United States v. Duval, Gilp*, 356. See FEES AND SALARIES.

§ 246. Expenditures made by an Indian agent for the benefit of Indians, and on a new reservation to which they had been removed, are not chargeable to the United States, but to the Indians for whose use such outlay was incurred. *Ibid*.

§ 247. The powers of a sub-Indian agent do not extend to drawing drafts on the government, so as to bind it, even though such drafts be given for necessities for the use of the Indians. *Jackson v. United States*,\* 1 Ct. Cl., 260.

§ 248. An Indian agent, after purchasing a threshing machine to be used at the government agency, has no authority to issue a voucher for the purchase money to a third person at the vendor's request, made at the time of the sale. *Johnson v. United States*,\* 18 Ct. Cl., 217.

§ 249. Indian superintendencies were not abolished by operation of the act of February 17, 1873, but the act took effect only on the designation of the president. *United States v. Wirt*,\* 3 Saw., 161.

§ 250. Under the statute of March 16, 1864, amending the act of June 30, 1834, an Indian born and resident in Oregon is *prima facie* a member of an Oregon tribe, and under the charge of the superintendent of Indian affairs for Oregon. Otherwise as to Indians born in Minnesota. *Ibid*.

## INDIAN LANDS.

See LAND.

## INDIAN TERRITORY.

See INDIANS; STATES AND TERRITORIES.

## INDIAN TREATIES.

See INDIANS; TREATIES.

## INDICTMENT.

See CRIMES, XXVI.

## INDORSEMENT.

See BILLS AND NOTES.

## INFANTS.

See DOMESTIC RELATIONS.

## INFORMATION.

See CRIMES; MARITIME LAW; PLEADING; PENALTIES.

## INFORMERS.

[See PATENTS, § 2817; PENALTIES AND FORFEITURES; REVENUE.]

**SUMMARY** — *Assistant assessor may become informer, § 1.— What constitutes an informer, § 2.— Officers, § 3.— Party procuring testimony, § 4.— Need not act as prosecutor, § 5.— Source of information, §§ 6-8.— Rights depend upon statute law, § 9.— Jurisdiction in the distribution of proceeds, § 10.— Special treasury agent, § 11.— First informer, §§ 12, 13.— Informer's share, § 14.— Under act of July 13, 1866, § 15.*

§ 1. An assistant assessor of internal revenue may become an informer, and as such be entitled to the share of a fine imposed in consequence of his information. *United States v. Chas-sell, § 16.*

§ 2. A person who induces a person to confess and implicate other offenders is not an informer within the meaning of the revenue laws. A person informed the revenue officers of a violation of the law by A., B. and C. They confessed and implicated D., who in turn confessed and implicated E. and F., who were fined. *Held*, that the original informer was entitled to a share of such fine as informer. *United States v. Simons, §§ 17-20.*

§ 3. A person under salary or receiving wages from the government for ferreting out frauds against the revenue is bound to disclose information received by him to the government, and does not by disclosing information relating to such violations of law become an informer so as to be entitled to the share awarded to informers under the law. A person appointed a special treasury agent, with the agreement that his compensation shall be merely that of an informer, is not, however, within the rule. *Ibid.*

§ 4. The fact that a person has procured valuable testimony making a strong case against offenders, but for which it is doubtful whether any conviction could have been had, or any money recovered from them, does not entitle the person procuring such testimony to any portion of the fine, when the fraud has been discovered and disclosed by others, and proceedings have been instituted in pursuance of that information. It is the person from whom the original evidence comes who is entitled to the informer's share. *Ibid.*

§ 5. It is not essential that an informer should act as prosecutor or be called as a witness; it is enough that the result is in fact reached primarily through his means. *United States v. One Hundred Barrels of Distilled Spirits, §§ 21-25.*

§ 6. A person who furnished information which led to a seizure and condemnation of property is entitled to a share as an informer, though he may have derived information from an assistant district attorney who makes no claim. *Ibid.*

§ 7. It seems that an officer who derives his information from the testimony of witnesses whom he has compelled to testify by legal process cannot claim to be an informer. *Ibid.*

§ 8. An officer of the government cannot be considered as an informer where his knowledge is acquired in the ordinary discharge of his duty touching the very subject-matter, or under a special retainer to investigate that matter; though it seems that where the facts are discovered incidentally and not in the direct line of his duty he may be so considered. *Ibid.*

§ 9. A person who furnishes information which leads to a seizure and forfeiture under the revenue laws is entitled to reward only in case such reward is given by express statute. *Robinson v. Hook*, §§ 26-30.

§ 10. Under the laws of the United States the court having jurisdiction of a seizure under the customs laws and proceedings therein has exclusive jurisdiction of the distribution of the proceeds to an informer in case of controversy. But in case there is no controversy as to who is entitled thereto, an action may be maintained in another court to recover such share from the collector in possession thereof for the purpose of distributing it according to law. *Ibid.*

§ 11. It seems that a special treasury agent is not entitled to a part of the forfeiture as a common informer under section 179 of the internal revenue act of July 13, 1866. *United States v. Funkhouser*, §§ 31-35.

§ 12. In a contest between informers under the revenue laws he is the first informer who, with the intention of having his information acted on, first gives information of a violation of law which induces the prosecution, and contributes to the recovery of the fine, penalty or forfeiture which is eventually recovered. *United States v. Simons*, §§ 17-20.

§ 13. The first informer under the revenue laws is he who first gives to a person authorized to receive it important information which in fact leads to the desired result. The offer is not confined to those who shall expose the details of the fraud; the person who gives the information by which the forfeiture is in fact decreed or imposed is within the fair intent of the act. *United States v. One Hundred Barrels of Distilled Spirits*, §§ 21-25.

§ 14. Under section 179 of the internal revenue act of July 13, 1866, and the treasury regulations of August 14, 1866, the informer's share must be taken from the net proceeds of the forfeiture. *United States v. Funkhouser*, §§ 31-35.

§ 15. In order to entitle an informer to a share of the proceeds of a forfeiture, under section 179 of the internal revenue act of July 13, 1866, the information must be given by the claimant to some officer of the government charged with the duty of acting on the information. It must be a plain statement of some one substantial "cause, matter or thing whereby a fine, penalty or forfeiture shall have been incurred," and not a mere suspicion; as a rule it should be in writing, and on oath if required by the officer, but not otherwise. It is sufficient if only one of several causes of forfeiture is given. Only the first informer, i. e., the one who "shall first inform of the cause," etc., is entitled to the reward. The information must be true in fact and capable of proof. *Ibid.*

[NOTES.— See §§ 36-94.]

#### UNITED STATES v. CHASELL.

(Circuit Court for New York: 6 Blatchford, 421-425. 1869.)

STATEMENT OF FACTS.—Chassell paid a fine for violating the internal revenue laws. Wood claimed the informer's share, basing his pretensions upon the certificate of the district attorney.

§ 16. *An assistant assessor may be an informer and receive compensation as such.*

Opinion by BENEDICT, J.

On the facts in this case a single question is raised, namely, whether the circumstance that Wood obtained the information, on the communication of which he bases his claim as informer, while in the discharge of his official duty as assistant assessor, debars him from claiming a share of the fine as informer. My opinion is that it does not, and for the following reasons: It was long since held that an inspector of the customs might become entitled to receive an informer's share by reason of information given by him to the collector of

customs, and was not debarred from that right by the fact that he was employed by the government in the enforcement of the revenue laws under a salary. *Hooper v. Fifty-one Casks of Brandy*, Dav., 370. This decision was acquiesced in and has since controlled the distribution of forfeitures under the customs laws.

If the early provisions of the internal revenue laws be examined they show clearly an intention on the part of congress to continue this feature of the customs laws in the laws relating to the internal revenue. Thus, the act of July 1, 1862, in the thirty-first section (12 U. S. Stat. at Large, 444), makes it the duty of a collector of internal revenue to prosecute for the recovery of any sums forfeited by the act, and declares that all fines, penalties and forfeitures shall be sued for in the name of the United States or of the collector, and that one moiety of the recovery shall be to the use of the person who, *if a collector or deputy collector*, shall first inform of the cause, matter or thing whereby such fine, penalty or forfeiture was incurred. This provision was reenacted in the thirty-seventh section of the act of March 3, 1863 (*id.*, 730), and substantially the same provision appears in the one hundred and seventy-ninth section of the act of June 30, 1864 (13 *id.*, 305). By the act of March 3, 1865 (*id.*, 483), section 179 of the act of 1864 is amended by striking out the words, "if a collector or deputy collector;" and the note to an edition of this act, which was then published and distributed by the government, declares that thereafter a moiety of all fines, penalties and forfeitures is to be paid to the informer, "whether officer of the revenue or a private citizen." These enactments indicate an unmistakable intention to permit officers of the revenue to participate, as informers, in the distribution of fines, penalties and forfeitures. The various subsequent acts disclose no change of intention, but have always left this right open to be claimed by any person; and they have been passed with full knowledge that revenue officers were constantly being paid large rewards as informers, and in the face of treasury regulations which clearly recognize their right to claim such rewards. There is no reasonable doubt, therefore, that congress intended, by the present act — what seems to be said by the act — that any person whosoever may share in a fine, penalty or forfeiture, provided it be made to appear that such person first informed of the cause, matter or thing, whereby such fine, penalty or forfeiture shall have been incurred.

The intention to include officers of the revenue in the general words used by the act, and to enable them to participate in the distribution of fines, penalties and forfeitures, is reasonable; for, this mode of stimulating the zeal of officials, by the hope of additional compensation, is a common practice in revenue laws, and the small fixed compensation which is attached to many offices tends to confirm the supposition that it was expected that such compensation would be increased by the rewards of diligence.

As there exist in the acts no words of limitation in regard to the persons who may become informers, so, also, there is no limitation in regard to the method by which the information shall have been acquired. Any person may become entitled to share as an informer, by reason of any information which contributes in a substantial way to recover the fine, penalty or forfeiture which is finally imposed, provided such information has not only been acquired, but also properly imparted. To whom imparted the act does not say; but its fair import is, that the information must be imparted to some one authorized to, and who does thereupon, take official action to recover the fine or



penalty, or to enforce the forfeiture, which the information discloses to have been incurred; and the information must be imparted with the intention of having it so acted upon. It must, also, be the first information so imparted. These restrictions can be fairly gathered from the words of the act, and I am unable to see that any other limitations can be reasonably inferred from anything contained in the act.

According to this construction of the law, it clearly appears that the present petitioner is entitled to a distributive share in the fine in question; for, it appears that, of his own motion, and by his own diligence, he acquired information, which, being acted on by the proper officer, led to the conviction of the offender. This information he imparted to the district attorney, who, and who alone, was authorized to institute the proceeding which resulted in the imposition of the fine, and he so imparted his information with the intent that such proceedings should be instituted upon his information, and his was the first information so imparted. These facts, unattended with any counter-vailing circumstances, entitle him, according to my view of the law, to be adjudged to be the legal informer, entitled to a distributive share of the fund in court.

In thus disposing of the case, I have not omitted to notice two recent cases arising under this same provision of law. *The United States v. One Hundred Barrels of Distilled Spirits*, 8 Int. Rev. Rec., 20 (§§ 21-25, *infra*), and *The United States v. Four Cutting Machines*. But I find nothing in the actual adjudication of those cases, upon the facts of those cases as I understand them, which leads me to a different conclusion from that at which I have arrived in this case.

#### UNITED STATES *v.* SIMONS.

(District Court for Michigan: 7 Federal Reporter, 702-715. 1881.)

**STATEMENT OF FACTS.**—Brakeman and Stadler claimed a share as informers in a fine imposed upon Simons and Burnstine for smuggling. The facts were that Brakeman made discoveries of the smuggling and fixed it upon Applebaum, who confessed, and implicated Simons and Burnstine as the principal offenders.

Opinion by BROWN, J.

Section 3 of the act of June 22, 1874 (18 St. at Large, 186), provides: "That whenever any person not an officer of the United States shall furnish to a district attorney, or to any chief officer of the customs, original information concerning any fraud upon the customs revenue, perpetrated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty or forfeiture incurred, whether by importers or their agents, or by any officer or person employed in the customs service, such compensation may, upon such recovery, be paid to such person so furnishing information, as shall be just and reasonable," etc. Section 6. "That no payment shall be made to any person furnishing information in any case wherein judicial proceedings shall have been instituted, unless his claim to compensation shall have been established to the satisfaction of the court, or judge having cognizance of such proceedings, and the value of his services, duly certified by the said court or judge for the information of the secretary of the treasury."

§ 17. *Who is an informer within the meaning of the act of June 22, 1874.*

It is well settled that in a contest between informers he is the informer

who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty or forfeiture which is eventually recovered. *U. S. v. George*, 6 Blatch., 406; *Sawyer v. Steele*, 3 Wash., 464; *City Bank v. Bangs*, 2 Edw. Ch., 95; *Lancaster v. Walch*, 4 M. & W., 16; *U. S. v. Isla de Cuba*, 2 Cliff., 458; *One Hundred Barrels of Whisky*, 2 Ben., 14; *Fifty Thousand Cigars*, 1 Low., 22.

§ 18. *One is not entitled to an informer's share for procuring valuable testimony. He is an informer who furnishes the original information.*

The fact that a person has procured valuable testimony, making a strong case against the offenders, but for which it is indeed doubtful whether any conviction could have been had, or any money recovered from them, does not entitle the person procuring such testimony to any portion of the fine, where the fraud has been discovered and disclosed by others, and proceedings have been commenced in pursuance of that information. The statute gives the informer's share to the one who furnishes the *original* information which shall lead to the recovery of the fine, but, whether justly or unjustly, awards nothing to those who furnish evidence to confirm the truth of the statements of the original informers, and this although the applicant may have spent much time and expended money in ferreting out the details of the fraud, since their action cannot be said to have induced the prosecutions. *U. S. v. George*, 6 Blatch., 406, 418.

Applying these principles to the case under consideration, it seems quite clear that Stadler cannot be considered the informer; in fact, he gave no information at all. All he did was to advise Jacobs, the father-in-law of Applebaum, to induce Applebaum to make a full confession of his connection with the smuggling transactions, and thereby implicate the defendants. This is in no sense of the word the furnishing of original information. As between Stadler, Jacobs and Applebaum, the last stands in much the best position of the three to be considered the informer.

§ 19. *An informer entitled to the reward although his information may have operated indirectly.*

It seems to me, however, that Brakeman may fairly be said to have furnished the original information which led to the recovery of the fine. It is true that he made no disclosures himself which implicated Simons and Burnstine; but he did unearth the fraud with which they were connected, by furnishing information against Lewis, Brown and Fink, who confessed their guilt and implicated Applebaum, who in his turn confessed and caused the arrest of Simons and Burnstine. These parties were all conspirators in the same fraudulent transactions, and it seems to me that the party who furnished the original information upon which a part of the conspirators were arrested should be considered the informer as to all the conspirators in the same fraud, it appearing that the other conspirators were arrested, not upon information given by any third party, but upon the confessions of the parties who had already been arrested. Applebaum earned immunity from punishment by his voluntary confession, and by the district attorney consenting to make use of his testimony against his co-conspirators, but equitably he is entitled to nothing more. *Whisky Cases*, 99 U. S., 594. Upon the other hand, Brakeman ought not to lose his share of the fine which would have been imposed upon the parties he informed against directly, by their confessing and inculcating others, and thus securing immunity. The interest of the informer ought to

be identical with that of the government. The interests of the government require the leading members of the conspiracy to be punished. The original informer ought not to lose by this being done. I think this view is borne out by the case of *Wescott v. Bradford*, 4 Wash., 492, in which the court discusses the question how far information given to the collector as to one thing may or may not be considered as extending to others, so as to warrant the conclusion that the forfeiture was recovered in pursuance of such information. The distinction that is taken there is between cases where several parties are implicated in a single fraud, and those wherein the discovery of one fraud results in the ferreting out of another fraud of the same description, but not connected with it.

§ 20. *An officer of the United States receiving salary or wages not entitled to an informer's reward.*

It only remains to consider whether Brakeman is such an officer of the United States as is excepted from the operation of the act of 1874, and is disentitled by reason of his official position to claim a share of the fine. I had supposed that in order to preclude a person from receiving the informer's share he must have been a permanent officer of the government, holding his authority by virtue of a commission or appointment by a chief officer of the customs. Such, I am informed, has been the ruling of the treasury department in this particular, but the courts seem to have uniformly taken a different view, and I am not disposed to dissent from their conclusions. Even before this act was passed, and when officers might be considered as informers, it was held by Judge Lowell, in *U. S. v. One Hundred Barrels of Distilled Spirits*, 1 Low., 244, that they could only be considered informers where they incidentally and not in the direct prosecution or course of their duty, or of any special retainer for that purpose, made a discovery.

"As if an inspector, put on board a vessel merely to keep the cargo safely, discovers smuggled goods concealed, or where an officer sent to inquire into a particular charge discovers something entirely different and before unsuspected, or where he is told by some one as a friend and not as an officer, or the facts which his informant, not wishing to be known, refuses to bring forward himself, but tells him for the very purpose of enabling him to give the information in his own name. In these cases an officer may be an informer." "Still," he observes, "it is clear that an officer cannot always be considered an informer merely because he, as an officer, acquires information useful to the government. If this knowledge is acquired in the ordinary discharge of his duty, touching the very subject-matter, or under a special retainer to investigate that matter, I cannot hold him entitled to a gratuity." See, also, *U. S. v. Thirty-four Barrels of Whisky*, 9 Int. Rev. Rec., 169; *U. S. v. Funkhouser*, 4 Biss., 176, 183 (§§ 31-35, *infra*).

The question was directly passed upon in the case of *Four Cutting Machines*, 3 Ben., 220, in which Judge Blatchford held that a person whose duty it is to disclose information, and who violates such duty if he does not disclose it, cannot be an informer, and that the person who imparted the information so as to be an informer must be one who has imposed upon him no official duty to impart the information.

Now it would appear that if Brakeman was under pay of the government and received a salary or wages of any kind for his services in endeavoring to ferret out these frauds, any information that he received it would be his duty to disclose to the collector or other officer of the treasury department, and

that in the light of these authorities he could not be considered an informer; but that, on the other hand, if he were simply employed by the special agent of the department to unearth these smuggling transactions, with the understanding that he should depend for his compensation solely upon his right to the informer's share, that he ought to receive it. As the affidavits are silent upon this point, I shall transmit this opinion to the secretary of the treasury, certifying the value of Brakeman's services to be \$500, and that he is entitled to receive the same as the informer, in case he is not an officer of the United States within the meaning of the law.

UNITED STATES *v.* ONE HUNDRED BARRELS OF DISTILLED SPIRITS.

(District Court for Massachusetts: 1 Lowell, 244-250; 8 Internal Revenue Record, 20. 1868.)

STATEMENT OF FACTS.—Four several lots of spirits, amounting to one hundred barrels, were seized, condemned and sold under the internal revenue law, and seven persons filed claims upon its proceeds, alleging that the frauds had been detected by means of the information they had respectively given. Further facts appear in the opinion of the court.

§ 21. *Statutes giving part of fines, penalties and forfeitures to informers.*

Opinion by LOWELL, J.

The statute under which the petitioners proceed is section 179 of the statute of 1864, as amended by that of 13th July, 1866 (14 Stat., 145-46), which declares that all fines, penalties and forfeitures which may be imposed or incurred [under the act], may be sued for, etc., and that a certain part shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty or forfeiture, who shall first inform of the cause, matter or thing whereby such fine, penalty or forfeiture shall have been incurred.

§ 22. *An informer under the statute is one who first gives to the proper officer such information as leads to the seizure.*

A good deal of stress was laid, in the argument, upon this language; and it was contended that no one was included in its terms who did not give information of the precise fraud, by the commission of which the goods became liable to forfeiture. My opinion is, that the meaning of this law is not substantially different from that of the customs act of 1799, section 91 (1 Stats., 697), which gives the share in one clause to the person *in pursuance* of whose information the forfeiture, etc., are recovered, and in another, to any officer of a revenue cutter *in consequence* of whose information they are recovered. "Fines, penalties and disabilities are not *incurred*," says Mr. Justice Thompson, "and do not accrue in the technical sense of the terms, until judgment. *U. S. v. Morris*, 10 Wheat., 299. In the ninth section of the act of 1866 (14 Stats., 101), the share of the fine therein referred to is for the person who shall give the information whereby it is imposed; and in still another section, the share is to go to the informer, if there be any, without further description. Under this statute, as under the other, and under the ordinary offers of reward for detection of a criminal or discovery of lost property, the first informer is he who first gives to a person authorized to receive it, important information, which, in fact, leads to the desired result. And the offer is not necessarily confined to persons who shall expose the details of the fraud. Thus, if the government officers were already aware of the offense, but were unable to trace the goods, and the informer supplied the necessary facts; or if

the informer, without knowing precisely what fraud had been perpetrated, knew of suspicious circumstances sufficient to justify a seizure, etc.,—in these and similar cases, the person who gave the information by which the forfeiture was in fact decreed or imposed would be within the fair intent of the act.

§ 23. *It is not necessary that the informer shall himself be the prosecutor.*

Accordingly, I have no hesitation in deciding that W. H. Swift is the first informer in respect to the thirty barrels found in his brother's warehouse in Federal street. It was in consequence of his information that they were seized and forfeited, and it does not appear that any facts of importance were furnished by any one else; and whether he was fully cognizant of the cause which rendered them liable to forfeiture or not, he was sufficiently so for all the practical purposes of the government. All the information it already had would have been useless without him, and his was sufficient, independently of what they possessed. It is not essential that an informer should act as prosecutor or be called as a witness; it is enough that the result is in fact reached primarily through his means. *Sawyer v. Steele*, 3 Wash., 464; *Besse v. Dyer*, 9 Allen, 151; *Crawshaw v. Roxbury*, 7 Gray, 374; *Smith v. Moore*, 1 C. B., 438.

Similar considerations govern the case of King. The officers had exhausted their clew, and had traced the whisky as far as they could, and abandoned the search, and the assistant district attorney, who gave King some information, makes no claim. It is clear that one who does not choose to be an informer may enable another to become so, even as against his own subsequent demand. *Fallick v. Barber*, 1 M. & S., 108; and it appears to me that Mr. King is entitled to the benefit of whatever knowledge he derived from Mr. Hyde, and is the informer in respect to the twenty barrels which he discovered. I do not mean to say that Mr. Hyde could himself be the informer.

§ 24. *In some cases an officer of the revenue may himself be the informer.*

The cases of the several officers of the revenue service present more difficulty. If the point were new, it might perhaps be open to argument that an inspector or other officer owes his whole time to the government, and that there is no consideration for a promise to pay him a further reward for the zealous discharge of his duty. But the treasury department and the courts have acquiesced in the decision of Judge Ware, in *Hooper v. Fifty-one Casks of Brandy*, Dav., 370, and it must be taken as settled that an officer of the revenue may, in some cases, be an informer. And the practice has been similar under the internal revenue laws, and rightly, as the statutes themselves show. Still it is clear that an officer cannot always be considered an informer merely because he as an officer acquires information useful to the government. If this knowledge is acquired in the ordinary discharge of his duty touching the very subject-matter, or under a special retainer to investigate that matter, I cannot hold him entitled to a gratuity.

§ 25. *An officer who derives his information from witnesses who are compelled to testify by legal process is not entitled to the rewards of an informer.*

I may take an illustration from the case of Mr. Hyde, whose information appears to have been of great use to the government, but who, in pursuance of a settled policy adopted in the district attorney's office, makes no claim as informer. His knowledge was obtained by the examination before the grand jury on oath of witnesses whom he compelled to attend; in other words, it was obtained by virtue of the great powers which the government confides to its prosecuting officers; but it is evident that the information obtained by

the exercise of such a power must be for the use of the government in whose name and behalf it is demanded of the witnesses, and not for that of the prosecuting officer, the jury, or the witnesses themselves. Similar considerations apply to all officers who are clothed with the duty of making an investigation on behalf of the government, whether with more or less ample powers.

In my view the cases in which an officer may be an informer are, where he incidentally, and not in the direct prosecution or course of his duty or of any special retainer for that purpose, makes a discovery; as if an inspector put on board a vessel merely to keep the cargo safely discovers smuggled goods concealed; or where an officer sent to inquire after a particular charge discovers something entirely different and before unsuspected; or where he is told by some one, as a friend and not as an officer, of facts which his informant, not wishing to be known, refuses to bring forward himself, but tells him for the very purpose of enabling him to give information in his own name; in these cases an officer may be informer. I do not at present think of any others.

Mr. Hawley's case, which has given me more trouble than any other, must be governed by these considerations. In my judgment his retainer as a revenue agent, under pay, to investigate these frauds, makes his time the time of the government, and his information the information of the government, and he cannot justly lay claim to any share of this reward.

And so of General McCartney and Mr. Sprague. They merely in the course of their duty pointed out to the persons to whom they were bound to point them out, the mistake in figures and the forgery which they respectively discovered; they had no choice to give or withhold the information, and their action had no reference to any forfeiture. I doubt if the fact in either case was of sufficient importance to entitle them as informers; but if it were, its bearing on the forfeiture was only incidental; the act was a mere statement of a fact occurring in the course of their business, which they could not but state if they did their duty, and the mere stating of which cannot make them informers in the sense of the law.

Mr. Horton and Mr. Hayes were merely the seizing officers, and I have held before, and shall continue to hold until otherwise instructed by superior authority, that an officer who has merely followed instructions and made a seizure which he was asked to make, although he may have exercised great skill and ingenuity, is not an informer. A recent customs act gives the seizing officer a share of forfeitures in cases where there is no informer, and I dare say this law may be wise and expedient so long as the policy of paying informers is adhered to, but it only confirms the view that a seizing officer, as such, is not an informer. It is strongly urged that the barrels seized by Mr. Horton are not proved to be a part of the Perry whisky, and that if they are not he is the sole discoverer, because Mr. Hyde sent him to find only Perry's whisky. But in such a case the burden is very strongly upon the officer to show that they are different. He was asked to look in Lowell street for contraband whisky, without any particular description of it; he looked there and found some, and there is very little evidence either way concerning the article found. The presumption is almost irresistible that it is the same whisky he was looking for. The argument that this whisky, if Perry's, ought to have been condemned under a different section of the statute, proves too much; for eighty of the barrels were Perry's, and were condemned under this section. That argument might have availed a claimant; but as it is admitted that Perry's whisky was liable to forfeiture under another clause, and as there was no defense, it

may well be that the court did not inquire as carefully' as it otherwise might have done, whether the evidence pointed more strongly to one or another violation of the act. I do not mean to say, however, that there was not sufficient *prima facie* evidence to entitle the government, in a defaulted action, to a condemnation under section 45.

Upon the whole, I grant the petitions of King and Swift, and deny the others.

ROBINSON v. HOOK.

(Circuit Court for Maine: 4 Mason, 139-157. 1826.)

STATEMENT OF FACTS.—Bill in equity for a discovery and account. In August, 1813, the plaintiff, with some other persons in a small boat, took possession of a small vessel of a suspicious appearance and conduct, then hovering on the coast of Maine, and which was employed in making collusive captures of vessels coming from the British Provinces, loaded with goods of British manufactures on American account. At the time of the seizure, a small packet was thrown overboard by the officers of the vessel, which was recovered by the seizors, and was found to contain letters and document, some with fictitious signatures, one wholly in cipher, and some in language and allusion designed for secrecy and private explanation. The whole disclosed a very extensive system of illicit commerce, carried on by citizens of the United States, and especially by some merchants at Boston, with England and the British Provinces, for the purpose of illegally importing into the New England states goods of British manufacture. These papers were delivered to the defendant, who then was, and yet is, collector of the customs for the district of Penebscot, who transmitted copies to the government. The charges in the bill are, that by virtue of the information communicated by these papers, the defendant made sundry seizures of vessels and merchandises of great value, and procured condemnation thereof in the courts of the United States, and received the proceeds adjudged to the collector, including the share of the informer; that the plaintiff is entitled to the informer's share of such seizures; that the papers were so intrusted to the defendant for the purpose of procuring such condemnations. It therefore prays a discovery and account, and general relief.

The answer of the defendant admits the receipt of the papers, and annexes copies of them; but denies that any seizure whatsoever was made by him in consequence of the information communicated by them; but admits that on a seizure made by another collector, he received what might be deemed the informer's share, and, after deducting his own expenses, he paid a moiety of the residue to the plaintiff and his brother, who was jointly interested with the plaintiff. It also relies on the statute of limitations, and denies all equity in plaintiff, etc. The general replication was filed.

Opinion by STORY, J.

This is a cause of a somewhat extraordinary nature. The secret papers disclose one of the most extensive enterprises for the illicit importation of British goods from the British Provinces into the United States, on American account, during the late war, by means of collusive captures and otherwise, which was probably ever undertaken in violation of our laws. That its success was not as complete as the plan was broad is owing, in a great measure, to the seizure of these very papers, which had the double tendency of deterring the parties from

the full execution of the scheme, and of stimulating the vigilance of the officers of our own government to defeat it. I am sorry to perceive that the *duces facti* are native merchants, and that their own examinations taken in this very cause leave not the slightest doubt of their intentional guilt. I will not attempt to characterize these transactions in the language which belongs to them; though it cannot be concealed that they are such as must carry along with them the reproaches of the country, and probably, in moments of cool reflection, the pains of self-condemnation to the parties themselves. Some things are indeed made clear by these papers, which were involved in much embarrassment and obscurity in the course of the prize proceedings of the late war. In the lenient administration of prize law, which was adopted by the courts of the United States during this period, and especially in lending an indulgent ear to the claims of our own citizens, it is some consolation to know that the justice of those sentences of condemnation which admitted of most controversy have, in an unexpected manner, been confirmed by facts recently brought to light.

§ 26. *The reward of an informer depends upon statute law.*

In considering the present case, it is material to observe that however great may be the merit of the plaintiff and his coadjutors in refusing the bribes offered to them for the suppression of these papers, and in putting them into the possession of the government for public purposes, and however great may be the benefit derived to the government by the facilities thus afforded to detect frauds, and to escape from mischievous violations of its rights, it is not within the cognizance of the court to administer any remedy for such services. So far as they are entitled to reward beyond that gratitude which must always be felt for public benefactors, it belongs exclusively to another department of the government to recognize and adjust the claim. Courts of equity can only enforce existing rights, which are always vested in the parties, and give such remedy as *ex æquo et bono* ought to attach to them.

It is material also to state that the present bill is exclusively framed upon the notion of a legal right. In its general structure it proceeds upon the ground that the plaintiff is entitled to the share of the informer, in cases of property seized and condemned for illicit traffic, in consequence of his information. It states that sundry seizures were made or claims interposed in behalf of the United States by the defendant, by means of this information, and that the defendant received large sums of money as the informer's part upon the condemnations on those seizures and claims, which he ought to account for and pay to the plaintiff. If there be any allegation in the bill more broad in its terms, it is too loose and indefinite to found any decree upon. There is no charge of any contract or agreement between the parties as to what use should be made of the papers, or that the defendant should act as general agent of the plaintiff in relation to them, and apply them for his benefit in the best manner he could, and account for any moneys so received, deducting a reasonable compensation. I do not mean to suggest that, upon the present state of the evidence, such a charge would materially aid the cause; but I wish to show, what in one aspect of the cause may be important, that no special trust or confidence is asserted, and that so far as the bill avows merits, it is upon the fact that the plaintiff is informer.

What, then, is to be deemed the nature of the bill? It cannot proceed upon any loose notion that a party who gives material information is entitled at common law, or in a court of equity, to a part of the proceeds of any property



seized and condemned by means of such information, or to any particular compensation for such information, when given to officers of the government. It is the duty of every citizen to aid in detecting violations of the laws, and enforcing the administration of public justice. His reward, in such cases, is to be found in the consciousness of a performance of duty to his country, and in the approbation of his fellow-citizens. There is no pecuniary recompense attached by the principles of law to services of this nature. He who brings a felon to public justice, or refuses to conceal a crime, is certainly entitled to great credit for his good conduct; but it has never been supposed that a contract could thereby be implied to share in the property which should accrue to the government or its officers upon the conviction. The law does not award pecuniary compensation for the performance of general duties; and it is only where some statute has held out, from policy, a specific reward, that the public faith is pledged to allow it.

The bill, then, must be understood to claim the informer's share of forfeited property in such cases only as are provided for by some statute; for a more general right is not acknowledged in the principles of our jurisprudence. It would have been well if the bill had, in this respect, aimed at something like certainty and accuracy; and had put the court in possession of the cases in which an informer is entitled to a share, and what that share is, to the extent at least of the claims asserted by the plaintiff. Whether in strictness the bill can be maintained without such allegations (for otherwise it is a mere searching and inquiring bill), I do not decide, because the point has not been pressed by counsel; and I am, generally, disinclined to take exceptions, where the merits of the cause, as it has been argued, can be disposed of without insisting on them. For the same reason I pass over the question whether the proper parties are before the court. Upon the plaintiff's own showing other persons were concerned in the original enterprise by which the secret papers were obtained, and no reason is stated in the bill why they are not made plaintiffs, or why the plaintiff is to be deemed the sole informer entitled to compensation. The cause is not without its difficulties from this omission.

§ 27. *Jurisdiction of a court of equity to entertain a suit by an informer to recover his share of a forfeiture.*

But waiving all discussion upon these collateral questions, I come to the consideration of the points which have been mainly relied upon by counsel to maintain or defeat the bill.

The first is, that the court has no jurisdiction to entertain the cause. Its jurisdiction over the parties as citizens of different states is not controverted. But it is said that causes of this nature are not within the proper cognizance of a court of equity. The argument addressed to the court is, that seizures like the present are causes exclusively of admiralty jurisdiction, and that the right to distribute the proceeds attaches as a necessary incident to the court having possession of the cause, in the same exclusive manner as the seizure itself. Consequently, if the plaintiff has any remedy at all, it is a remedy to be administered upon his petition, as informer, to the admiralty court, which awarded the condemnation and distribution of the proceeds.

Of the right of the courts of the United States, exercising admiralty jurisdiction, to decree a distribution of the proceeds subjected to condemnation as incidental to the possession of the principal cause, no legal doubt can be entertained. It is a point long since settled in the practice of this court, and the doctrine has been fully recognized by the supreme court in the case of *The*

Josefa Segunda, 10 Wheat., 312, 322. The claims of the parties who are entitled to distribution may be brought forward and specified on application to the court in the original decree. But if no such application is made, the parties in interest may obtain the same result by means of a supplemental libel, bringing the matter before the cognizance of the court. Usually the form of the decree in common cases is, "that the proceeds be distributed according to law." And if no controversy arises, this is sufficient. The collection act of 1799 (ch. 128, § 89) provides that the proceeds of all seizures, after condemnation by the court, shall be paid over to the collector, and he is directed to pay and distribute the same according to law. But this does not take from the court the right to ascertain who are the parties entitled to distribution, or clothe the collector with any such authority. He is a mere ministerial officer, who is to distribute the forfeiture under the direction and supervision of the court.

The authority to distribute being then clearly vested in the court having possession of the principal cause, the next consideration is, how far that authority is exclusive. By the judiciary act of 1789 (ch. 20, § 9), it is provided that the district court shall have *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, and also *exclusive* original jurisdiction of all seizures on land or other waters than as aforesaid made. If the jurisdiction over the seizure, then, is exclusive, it would seem to follow that it is also exclusive over the incidents, of which the distribution is one. It might otherwise happen that a conflict of jurisdictions might arrive, and that different parties might be held entitled in different courts. Nor am I able to perceive how any judgment in any court of common law or equity could oust the proper court possessing cognizance of the seizure from the free and full exercise of its distributing authority. Cases of this sort are familiar in the admiralty. The settled rule, acknowledged by the courts of common law, is that where the admiralty has exclusive jurisdiction of the principal cause, it has the like jurisdiction over all the incidents. - Therefore, in matters of prize, it has been held that the admiralty possesses exclusive jurisdiction to ascertain who are the captors, because it is an incident to the general jurisdiction, and included in the power of distribution. See *Smart v. Wolfe*, 3 T. R., 323; *Lord Camden v. Horne*, 4 T. R., 383; S. C., 1 H. Bl., 476, 524; *Willis v. Commissioners of Prizes*, 5 East, 22; *Duckworth v. Tucker*, 2 Taunt., 7; *Keene v. The Ship Gloucester*, 2 Dall., 37; *Penhallow v. Doane*, 3 Dall., 54; *The Brutus*, 2 Gall., 526; *The Dash*, 1 Mason, 4. Courts of common law decline any interference in the matter. The same principle applies to cases of seizure by the strictest analogy, for these are exclusively cognizable in the district court, and the exclusive authority to ascertain the distributees seems to be a natural, if not an inseparable, incident. The same public policy which justifies the exclusive appropriation of the former to a particular tribunal, points with equal cogency to a like appropriation of the latter.

Even in cases partaking more of the nature of concurrent jurisdiction, at least under certain circumstances, the court obtaining possession of the cause by a process *in rem* acquires an exclusive right over the incidents. As in cases of salvage on the instance side of the court, it has always been supposed that the possession of the cause gave the court an exclusive authority, not only to decree salvage, but to decide who were the salvors, and how the salvage should

be distributed. It has never been imagined that any other court could overhaul or modify the distribution so made or decree other persons to be salvors. And certainly the mischiefs of such an interference would be very extensive, and would create embarrassment to all the parties in interest. A court of common law can dispose only of the interests of the parties litigating before it; a court acting *in rem* can dispose of the claims of all persons asserting any title to the property, and adjust conflicting equities.

In England the court of exchequer has exclusive jurisdiction of revenue seizures and of all their incidents. Harg. Law Tracts, 226, 227; Atty. Gen. v. Lade, Parker, 57, 69. At least, after some research, I have not been able to trace an instance in which any question of this nature has been litigated in other courts. In informations on seizures, the informer is always, as seisor, named a party, and if he is entitled to any share of the forfeiture, the judgment of the court ascertains and decrees it; if not entitled, the whole is adjudged to the crown. *Malden v. Bartlett*, Parker, 105; *Mod. Pr. Exch.*, 150, 387; *The Bolina*, 1 Gall., 75, 78.

Upon the principles of the common law, any person might seize for the benefit of the crown. If a part of the forfeiture, by law, belonged to the informer, he was entitled to seize and prosecute in the exchequer; and the latter has authority, in cases of different seizures of the same goods by different informers, to compel an interpleader and decide who is the informer entitled to priority. Harg. Law Tracts, p. 227. This authority is believed to be exclusive. Some inconveniences and frauds having arisen from allowing any persons whatsoever to make seizures for breaches of the revenue laws, the authority was, at least as early as the statute of 14 Charles 2 (ch. 11, §§ 15 and 17), limited to officers of the customs, and other persons specially appointed by certain officers of the crown for that purpose. Harg. Law Tracts, p. 227, and note.

In the British system no person seems to be deemed an informer, entitled to share in the distribution, unless he is the seisor, and named as such in the information. *Bacon's Abr.*, Smuggling, F.; Harg. Law Tracts, p. 227. And in the judgments in the exchequer, the usual clause of distribution of the forfeiture states the proportions in which the parties are to take, and to whose use. *Mod. Pr. Exch.*, 150, 387, etc. Persons who are merely instrumental by giving information in causing seizures to be made by the proper officers do not seem to have any vested right in the forfeiture, but are left to the bounty of the government or its officers.

Our system differs, in several respects, from that of England. Suits for forfeitures are required to be brought in the name of the United States. Seizures can only be made by officers of the customs; and informers, as such, are never parties to the original proceedings. The collectors of the customs are enjoined to cause suits to be brought for all forfeitures, and are authorized to receive the proceeds, after condemnation, from the proper court, and to "pay and distribute the same, without delay, according to law." The forfeitures are distributable as follows: One moiety is divided, in equal shares, between the collector, naval officer and surveyor, or such of such officers as there are in the district. But if the forfeiture is recovered in pursuance of information given to the collector by any person except the naval officer or surveyor, the one half of such moiety is given to such informer. The other moiety is for the use of the United States, unless in certain excepted cases. Act of 1799, ch. 128, §§ 70, 89, 91. It seems clear, therefore, that by our laws the person

giving the information by which the recovery is had has a vested right in the proceeds of the forfeiture, as much so as the collector or other officer of the customs, or the United States. The only question which is open for litigation is, whether he is such an informer. Little light can therefore be gathered to assist us in the present inquiry, by the course of proceedings of the court of exchequer, as they do not furnish a close analogy.

§ 28. — *the proper practice stated.*

Upon the whole, the strong inclination of my opinion is, that the court, having cognizance of the seizure, has exclusive jurisdiction over the question who is the informer, entitled to share in the distribution, if that matter is put in controversy; and such, I consider, the bearing of the decision of the supreme court in *The Josefa Segunda*, 10 Wheat., 312. But in cases where the fact of the party's being informer is not denied, I can perceive no reason why a suit may not be maintained at common law or equity, for his share of the proceeds in the hands of the collector, any more than in other cases where money is received in trust to be accounted for and paid over to another. The money received by the collector is to be distributed according to law, in the proportion to which the distributees are entitled. No doubt can be entertained that the United States, and the naval officer and surveyor, may maintain such suits for their shares; for the parties and the amount are ascertained by law. The money, received by the collector, is money received to their use. There is nothing to be controverted or settled between him and them. It is like the common case of captors suing prize agents in courts of common law for their shares of prize money, which have been decreed by the court, and paid over to agents for distribution. The courts of common law will not adjudge upon the question whether the property is prize or not, or who are the captors; but these questions being settled by the admiralty, they consider the proceeds in the hands of the prize agent as money had and received to the sue of those who have been adjudged captors, and distributable according to the respective shares of the parties. See *Decatur v. Chew*, 1 Gall., 506, and the cases there cited; *Good v. Blenitt*, 13 Ves., 397.

Nor do I entertain a doubt that a bill in equity will lie in aid of the jurisdiction of the court, having cognizance of the seizure, to compel a discovery from the collector, whether the plaintiff was not the former, and admitted by him as such. And if the fact is admitted, and a bill should be properly framed for relief, I can perceive no reason why a court of equity may not, under such circumstances, decree the party to account. The conflict of jurisdictions, or of cross distributions, could not arise.

It is not, however, my wish to decide the present cause upon the particular ground of jurisdiction. Indeed it would not extend to the whole bill, for there is a sum of money received by the defendant, to which he admits the plaintiff to have had an equitable interest of some sort, as an informer or *quasi* informer; and the question is, whether the share already paid to the plaintiff is his fair proportion. I shall have occasion hereafter to notice this matter more at large. In respect to the bill itself, in its general structure, the difficulty of maintaining jurisdiction over some of the questions propounded at the bar arises, not from its own allegations, but from the denials of the answer and the nature of the proofs.

§ 29. *Rule in equity as to the bar of the statute of limitations.*

The next point of defense relied on is the general statute of limitations of Massachusetts and Maine, in respect to personal actions, limiting those founded

on simple contracts, etc., to six years. It is said that the statute of limitations is not a bar to suits in equity, but only to suits at law. In respect to cases purely of equitable jurisdiction and equitable rights, this may be true in a strict sense; but even then courts of equity adopt the analogy of the statute of limitations, and hold the equitable right barred by the same lapse of time which would bar it if it were a legal right. Of course, if there are other equitable considerations, which, upon principle, ought to avoid the bar, courts of equity will recognize them; but if the case is naked, the bar is unhesitatingly applied. But in cases of concurrent jurisdiction, as of accounts, where the party may proceed either at law or in equity, it appears to me that the statute of limitations applies with equal force in both courts. If it be not a positive bar in equity, it seems entitled to the same universality of application in equity as it would have at law. It would otherwise follow that a legal right might be extinct at law, and yet be of validity in equity, under exactly the same circumstances, and stripped of all grounds for conscientious interference. This distinction appears to me deserving of consideration, and has entered somewhat into the doctrines supported by the more recent and exact authorities. See *Bond v. Hopkins*, 1 Sch. & Lef., 413, 428; *Havendon v. Lord Annesly*, 2 Sch. & Lef., 607, 630; *Kane v. Bloodgood*, 7 Johns. Ch., 90; *Murray v. Coster*, 20 Johns., 576; *Stackhouse v. Barnston*, 10 Ves., 453, 465, 469; *Cholmondeley v. Clinton*, 2 Jac. & Walk., 1, 149, etc.; *Elmendorf v. Taylor*, 10 Wheat., 152, 177, note; *Sutton v. Earl Scarborough*, 9 Ves., 175; *Webster v. Webster*, 10 Ves., 93; *Beckford v. Wade*, 17 Ves., 87.

The present bill is, in substance, a bill for an account of moneys received for the use of the plaintiff; and as far as any moneys are shown by the proofs to have been received, the receipt was more than six years before the filing of the bill. The answer utterly denies the receipt of any moneys for the benefit of the plaintiff, which have not been accounted for. The bill alleges no promise within six years; nor do I perceive any testimony which establishes any distinct acknowledgment of a debt within six years sufficient to take the case out of the statute of limitations. Even if Bartlett be a competent witness, he is but a single witness, and his statements are too loose and general to found any satisfactory conclusion in favor of such an acknowledgment.

In this posture of the case the principal argument relied upon to avoid the effect of the statutable bar is, that the present is a case of trust, and trusts are not within the statute of limitations. It is remarkable that the bill itself does not, as has been already hinted, undertake to assert it to be a case of direct and positive trust, founding the general relation of trustee and *cestui que trust* between the parties. If it anywhere glances at such a relation, it is merely argued by way of inference to be drawn from the general complexion of the facts. In this view there is some difficulty in giving full effect to the argument.

But when it is said that the statute of limitations does not apply to cases of trust, it is material to consider the sense in which that proposition is to be understood. In respect to trusts, which are strictly such, and recognized and enforced in courts of equity only, such as express trusts created by the parties for particular purposes, the doctrine is, in general, true. So long as the relation of trustee and *cestui que trust* is admitted, in cases of express trusts, to exist between the parties, the very duties to be performed by the trustee prohibit him, in general, from setting up such a bar. Acts which, done by a stranger, might be deemed adverse, when done by a trustee admit of a very

different interpretation. But even in cases of express trust, if an open, public adverse claim is set up by the trustee against his *cestui que trust*, and the trust itself is denied as any longer subsisting, there is much reason to hold that the bar ought to be admitted to arise from such period. Certain it is that if the trustee recognizes another person as the *cestui que trust*, long possession and continued enjoyment of the property under such recognition will entitle the substituted *cestui que trust* to set it up as a bar in equity. That was the decision in the great case of *Lord Cholmondeley v. Lord Clinton*, 2 Jac. & Walk., 1, and furnishes a rule for all cases falling under the like analogy.

But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of money received to use, or of factorage concerns, or of general account, into whose service the doctrine might not be pressed. The doctrine appears to me well established, that in cases, like the present, of merely constructive trusts, where there are concurrent remedies at law and in equity, the statute of limitations is a good bar, and may be pleaded to a suit in equity as well as at law. If there be any contrariety in the authorities on this subject, the more recent appear to me to be settled on the most solid foundations. It would be a waste of time to go through them at large. The most material of them are collected and commented on with great ability by Mr. Chancellor Kent, in *Kane v. Bloodgood*, 7 Johns. Ch., 90; and the doctrine itself is vindicated with a luminous but masculine brevity, by Mr. Chief Justice Spencer, in *Murray v. Coster*, 20 Johns., 576. I gladly refer to these cases as nearly exhausting the topic. It has, however, been recently illustrated, in perfect harmony with opinions in the New York cases, by one of the most elaborate judgments of that eminent judge, Sir Thomas Plumer. I allude to the decision in *Lord Cholmondeley v. Clinton*, 2 Jac. & Walk., 1. See, also, *Sutton v. Lord Scarborough*, 9 Ves., 71; *Hoven-den v. Lord Annesly*, 2 Sch. & Lefr., 607; *Beckforth v. Wade*, 17 Ves., 87; *Sturt v. Mellish*, 2 Atk., 610; *Prevost v. Gratz*, 6 Wheat., 504; *Elmendorf v. Taylor*, 10 Wheat., 152. I think, therefore, the statute of limitations clearly applicable to the present case; and as no sufficient ground is stated to avoid its operation in the averments of the bill or in the facts in evidence, it might well govern the decision of the court. My desire, however, rather is to put the cause upon its general merits, independent of the statutable bar; and with this view, I shall proceed to the last point made at the bar, and that is, that upon the whole facts the plaintiff has no equity.

§ 30. *Whether plaintiff has any standing as an informer.*

However general and sweeping the allegations of the bill are, they are met by a full denial in the answer, and at the hearing the proofs narrowed down the plaintiff's rights, as informer, to the consideration of three cases only, viz., the Traveller, the Caroline, and the George.

There are one or two general remarks necessary to be made before entering upon the particular consideration of these cases. The bill, as has been already suggested, proceeds against the defendant solely as receiver of the informer's share, belonging to the plaintiff, of certain forfeitures successfully enforced in pursuance of his information. It charges that the defendant, at the time of the delivery of the packet to him, was collector of the district of Penobscot, and that by means of the information furnished by the plaintiff, through the

disclosures in the packet, he caused seizures to be made or claims interposed in behalf of the United States, and did procure condemnation in the district, circuit and supreme courts, of sundry vessels and cargoes, and did receive the informer's share of the same, which he ought to have paid to the plaintiff. It is incumbent on the plaintiff, then, to make out the substance of the charge, and to establish that seizures were made, claims interposed, and condemnations procured, and the informer's share received by the defendant, before he can successfully assert a claim against the defendant. The terms of the revenue act of 1799 (ch. 128, § 91) are, "that in all cases where such penalties, fines and forfeitures shall be recovered *in pursuance of information given to such collector* by any person other than the naval officer or surveyor of the district, the one-half of such moiety [*i. e.*, the collector's share, etc.] shall be to such informer." This clause constitutes the very foundation of the plaintiff's claim. He stands upon the rights hereby conferred, and can draw no other statute to his aid. It is incumbent on him then to show that a recovery of the forfeiture has been made *in pursuance of his information given to the collector*. Now it is explicitly denied by the answer that any seizure whatsoever was made, or claim interposed, by the defendant, in pursuance of any information given by the plaintiff to him. The seizures in the cases of the Traveller and the Caroline were made by other collectors, and the claim in behalf of the United States, in the case of the George, was interposed by another collector. So that, in point of fact, the plaintiff never stood in the relation of informer to the defendant, as *seizing collector*. Nor is any evidence produced by the plaintiff which clearly establishes that, in either of these three cases, the condemnation was procured in pursuance of any information given by the plaintiff. In respect to the Traveller and the George, the answer expressly negatives it; in respect to the Caroline, it was controverted by the seizing collector, and finally adjusted by compromise. The answer farther goes on to deny that any money was received as the informer's share in either of the cases, except the Caroline, and the plaintiff has not disproved this allegation. Upon this broad cast of the defendant's case, it is certainly surrounded with difficulties. He has not chosen to introduce into his proofs the testimony of either of the seizing collectors, so that there is nothing to assist the court in the ascertainment of the point, how far, or in what shape, he was deemed an informer aiding in the recovery of the forfeiture by those officers.

A closer inspection of the facts applicable to each of the three cases does not relieve the pressure of these difficulties. In the first place as to the Traveller. She was seized by the collector of the district of Frenchman's Bay before any information of the contents of the packet was, in fact, communicated. The seizure was not, therefore, caused by any such information, and there is no evidence to show that the condemnation was assisted by it. There is this additional circumstance, that the plaintiff was present at the time of the trial and condemnation of that vessel, and then consulted counsel, and brought forward a claim for the informer's share of the proceeds, which was either abandoned or not admitted by the parties in interest, or by the court. This was as early as the latter part of the year 1813, and the plaintiff has ever since slumbered upon his supposed rights, acquired under that seizure, with a knowledge that the claim was then resisted.

In the next place as to the Caroline. The sum of \$2,000 was received by the defendant as the informer's share out of the proceeds of that seizure, upon

a compromise with the collector of Waldborough. The defendant deducted \$200 for expenses, and divided the residue, taking one-half to himself, and paying over the other half to the plaintiff and his brother, David Robinson, in equal shares. This transaction was as early as the year 1816. No complaint or dissatisfaction appears to have been expressed at the time in respect to this settlement. The plaintiff's present bill does not attempt to impeach it, or to assert that it was wrong or fraudulent. And after so long an acquiescence with so few materials for accurate judgment, it would be too much to require the court to repudiate that which the parties at the time seem to have thought an equitable distribution.

In the last place as to the *George*. She was originally libeled as prize by persons claiming to be captors, and brought into the district of Frenchman's Bay, where she was seized in January, 1814, by the collector on the suspicion of a collusive capture, and in the prize proceedings a claim was interposed by the collector, in behalf of the United States, on this ground. The capture was ultimately adjudged to be collusive, and in the supreme court she was, at February term, 1817, finally condemned to the United States for this cause. I allude to this fact, though not strictly in evidence, because the parties admitted it to be as stated in the report of the case in 2 Wheat., 278. I do not dwell on the point that the condemnation was in a case of prize, and not on a libel for a breach of our revenue or municipal laws, in which alone the rights of informers are provided for, because, as a seizure was made for the forfeiture, and the proceedings were stayed solely by the claim and ultimate condemnation in the prize proceedings, I am not prepared to say that all the parties interested might not be entitled in the same manner as if the forfeiture had been insisted upon in an original libel by the collector. The distribution seems to have been made by the government upon the same principles. But what I rely on is, that it is denied in the answer that any information was derived from or through the plaintiff, which in any degree conduced to the condemnation of the *George*, and no evidence has been adduced to prove the fact, and no connection is shown between the parties or transactions in the case of the *George*, and those alluded to in the letters contained in the packet. No such connection was pointed out at the argument, and the court has not, of course, any means of ascertaining it. Yet if any material information had been derived from these letters, they would certainly have been used on the trial of the *George*, or at least the nature and extent of such information could have been traced and pointed out by those through whose agency the suit was conducted. There is the more doubt upon this point because the disclosures in the packet were obtained in September, 1813, and the interception of the papers must have been immediately known to the persons who planned the illicit enterprises, and the collusive capture of the *George* did not take place until January, 1814. Ample time was therefore given to recall any intended shipments, and it is not probable that the same parties would have subjected themselves to the risk of a detection by the government, founded upon the possession of such documents.

Upon the whole, my opinion is that upon the proofs in the cause it is impossible to support the plaintiff's bill. If he has any merits, he has been unable to present them in a shape by which the court can afford him redress, or those merits are of a character not belonging to the jurisdiction of a judicial tribunal. In my judgment the bill ought to be dismissed with costs.

The district judge concurred in this opinion.



## UNITED STATES v. FUNKHOUSER.

(District Court for Indiana: 4 Bissell, 176-187. 1868.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—This was a proceeding for the adjudication of a forfeiture of a distillery, distillery materials, machinery and apparatus, and a large quantity of whisky, the property of Funkhouser & Co., of Lafayette, for violation of the internal revenue law.

The libel was filed September 27, 1867, and on the 20th of December following, a judgment of forfeiture of the property in question was pronounced. Under this judgment the property has since been sold; and the proceeds remain in the hands of the marshal.

Several persons have preferred claims, as informers, to a portion of said proceeds. And the question to be decided is whether any of said claims—and, if so, which—shall be allowed. Among the various claims preferred, there are only two which, according to the evidence, are entitled to the least consideration of the court,—that of George L. Little, and that of Charles Lamb and Rufus Chadwick. The contest is, therefore, between Little of the one part, and Lamb and Chadwick of the other.

The libel recognizes Little as the informer. It commences thus: "Alfred Kilgore, attorney," etc., "who prosecutes for the United States, as well as for George L. Little, the informer herein, exhibits this his libel," etc. And it concludes with a prayer of process against the property, and that all persons in interest be required to appear and show cause "why said forfeiture should not be decreed in manner and form as by law provided, one-half of the proceeds of sale for the use of George L. Little, the informer."

On the 15th of January, 1868, Little filed under oath what he calls "a supplemental claim and answer." In this he asserts that he is the first informer; that on the 9th of September, 1867, he proceeded to Lafayette "in the capacity of a special agent of the treasury department," to investigate the manner in which Funkhouser & Co. carried on their business of distilling, and to ascertain whether they had violated the internal revenue laws; that he spent several days in that investigation, and ascertained all the facts on which the judgment of forfeiture was rendered; that, on the 12th of September, 1867, he embodied the result of said investigation in a report to the collector of the proper district, and promptly advised the internal revenue commissioners of said result; that, on the facts developed by said investigation alone, the seizure of the property was made, the libel filed and the judgment of forfeiture rendered; and that Lamb and Chadwick furnished no information which led to these results.

On the 19th of December, 1867, the day before the judgment of forfeiture, Lamb and Chadwick filed their claim. In it they allege in general terms that they are the first informers and entitled to a moiety of the proceeds; and that Little is not the first informer, and is not entitled to any of the proceeds. And they pray the court to protect their interests and to allow their claim.

On the 20th of March, 1868, Lamb and Chadwick amended their claim by alleging that they discovered the frauds out of which said forfeiture arose before the 1st of September, 1867, and gave information thereof to the assessor and collector of the proper district before Little made his said investigation and discoveries at Lafayette, and, before that investigation, gave to Little, in his character of a special agent of the treasury department, full and complete

information of said frauds; and they aver that "said Little then and there undertook and faithfully promised, in consideration of said information, and the communication thereof by them to him, that he would see that their rights as informers against the said distillery of Funkhouser & Co. should be protected; and they say that, relying on said promise and undertaking, . . . they took no steps to protect or secure their own rights as such informers until they learned that said Little, in direct violation of his aforesaid promise and undertaking, had fraudulently and falsely set up a claim as informer" in the premises; and that, confiding in said promise, they were induced to give their claim no further attention till they discovered Little's said fraud on them, whereupon they immediately filed their claim.

It is understood that the district attorney takes no part in this controversy. A great mass of testimony, in the form of depositions, has been filed by the contending claimants. This evidence, I think, establishes the following facts:

On the 1st of September, 1867, Little was, and has ever since continued to be, a special agent of the United States treasury department. In that capacity he was employed at St. Louis early in that month. While there, he received from the treasury department a letter dated September 4, 1867, instructing him to proceed to Lafayette and investigate whisky frauds suspected to have been perpetrated there. He arrived at Lafayette about the 10th of December, and forthwith commenced said investigation. In a few days he discovered that Funkhouser & Co., who had carried on a distillery at Lafayette, had been guilty of divers frauds on the revenue, and had thereby forfeited said distillery and its appurtenances, with large quantities of whisky, to the government, and had defrauded the revenue to the amount of \$49,330. On the 12th of September, 1867, he made out a detailed written statement of said frauds and forfeitures, and delivered the same to Williams, the collector of the district in which the distillery was situate. At the same time he telegraphed Hon. E. A. Rollins, commissioner of internal revenue, of the same facts. On the information thus given by Little the property was seized by Williams, the collector, who thereupon forwarded to the district attorney the facts so communicated to him by Little. Little also had communication with the district attorney; and the district attorney, on the information above thus obtained through Little, framed the libel on which the judgment of forfeiture was rendered. Little's discovery of any of the causes of said forfeiture could not have been made earlier than the 10th of September, 1867; and he did not, in any sense, become an informer till the 12th of that month.

About the 1st of September, 1867, and certainly before the 10th of that month, Lamb and Chadwick, by a joint inquiry, discovered that Funkhouser & Co. were shipping whisky in barrels from their distillery in duplicate serial numbers, in violation of the thirty-eighth section of the internal revenue act of July 13, 1868, and immediately gave information thereof to Thomas W. Fry, assessor of the district, and delivered to said Fry a written statement of the serial numbers so duplicated, with the dates of the shipments. In July or August, 1867, Lamb and Chadwick gave like information and written statements to one G. W. Giesey, a special agent of the treasury department residing in Cincinnati, and then at Lafayette investigating these whisky frauds; but he, as it seems, made no use of the information they gave him. They also, before the 10th of September, 1867, wrote to the district attorney concerning these frauds; but they stated nothing with sufficient definiteness to enable him to act on it, and he did not act on it. About the 10th of September,

1867, while Little was making said investigation, and after he had discovered enough to effect said forfeiture, Lamb and Chadwick informed him that they knew of important facts relative thereto. He requested them to give him these facts. At first they refused. But afterwards, and before the 12th of September, 1867, they communicated to him the same facts in writing which they had, as aforesaid, given to Fry and Giesey; and Little embodied them in his said report to Williams; and these facts, as to duplicate serial numbers, were, among other causes, stated in the libel as grounds of the forfeiture aforesaid. Lamb and Chadwick both swear that they gave Little the said information in consideration that he then promised them to protect them in their rights as informers. But Little, under oath, denies this promise. The promise, I think, must be considered as proved.

§ 31. *What necessary to constitute one an informer under section 179, act of July 13, 1866.*

The parties claim, as informers, under the one hundred and seventy-ninth section of the act of July 13, 1866 (14 U. S. Stat. at Large, 145). That section provides that a portion of the judgment, in cases like the present, "shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty or forfeiture, who shall first inform of the cause, matter or thing, whereby such fine, penalty or forfeiture shall have been incurred."

To entitle any person to a share of the judgment as informer under this section, I think the following things are necessary:

1. The information must be given by the claimant to some officer of the government on whom the law devolves the power and duty of acting on such information. Thus, I suppose that information to the district attorney, or to the proper assessor or collector, or to a special agent of the treasury department charged with the duty of inquiring into the matter to which the information given relates, is sufficient so far as the person to whom it is given is concerned.

2. The information must be a plain statement of some one substantial "cause, matter or thing whereby a fine, penalty or forfeiture shall have been incurred."

It is certainly not sufficient to state a general suspicion or rumor of a fraud on the revenue, although such statement might lead to inquiries disclosing facts sufficient to incur the liability. Nor would a sound, positive statement that a fine, penalty or forfeiture had been incurred be sufficient without a statement of the "cause, matter or thing" for which the same was incurred.

It is probable that, as a general rule, the information ought to be written; for officers of the revenue could hardly be expected to act on verbal assertions in such a case. Indeed, it appears to be the practice in some places to require the information not only to be in writing, but to be supported by affidavit. And I would think that the revenue officer would not be bound to pay any attention to information to which the informant, if required, refused to swear. But if he was not required by the officer to swear to it, I think it would not be invalid for not being under oath.

3. If several causes exist, by either of which a fine, penalty or forfeiture is incurred, information of any one of them, properly given to the proper officer, would entitle the informer to his claim, if he is the "first" informer.

§ 32. *The first informer, i. e., he who shall first inform of the cause, matter, etc., whereby such penalty, etc., shall have been incurred, is alone entitled to a share in the judgment.*

4. None but the *first* informer is entitled to any share in the judgment. And the *first* informer is he only who, in the language of the act, "shall *first* inform of the cause, matter or thing whereby such fine, penalty or forfeiture shall have been incurred."

§ 33. *The information must be true, and capable of proof.*

5. The information thus first given must be true in substance and in fact; and it must be capable of proof. If it be false, or if it cannot be proved to be true, it can be of no value to the government. The policy of the government is to reward the person who shall first furnish valuable information of the act of forfeiture. And if the information given be untrue or incapable of proof (which is the same thing in effect), it is of no value, and cannot therefore entitle the informer to a reward.

§ 34. *Seemle, that the fact that the informer is a special agent prevents him from claiming as a common informer.*

Against the claim of Mr. Little it is insisted that whatever information he may have given, and how early soever he may have given it, his official position precludes his claim as being a common informer. The nineteenth section above cited gives the share to the person "who shall first inform," without excluding revenue officials, or any other class of men. But it is objected that the claim of Mr. Little is precluded by the ninth section of the act of July 13, 1866 (14 U. S. Stat. at Large, 101), amending section 5, act of June 13, 1864, in which it is declared that "any inspector or revenue agent, or any special agent appointed by the secretary of the treasury, who shall demand or receive any compensation, fee or reward other than such as are provided by law, for or in regard to the performance of his official duties, shall upon conviction be fined," etc. The fourteenth section of the act of March 3, 1865, provides for the appointment of revenue agents, "who shall be paid, in addition to the expenses necessarily incurred by them, such compensation as the secretary of the treasury shall deem just and reasonable, not exceeding two thousand dollars per annum."

In a case very similar to the present, Judge Blatchford, of the southern district of New York, has allowed a special agent of the treasury to make claim as a common informer; though it does not appear that any objection to his right to claim was made under the acts above cited. Internal Revenue Record of November 23, 1867, p. 179. It is understood, also, that in cases of forfeiture and penalties compromised before judgment, the treasury department has been in the habit of allowing assessors, collectors, and special agents of the revenue, as first informers, a share in the proceeds of the penalty or forfeiture.

In view of the acts of March 3, 1865, and July 13, 1866, above referred to, as well as of general principles and policy, I entertain great doubt whether a special agent of the revenue who, in pursuance of instructions given him, first discovers facts working a forfeiture under the revenue laws, can by reason thereof be allowed to share in the proceeds of the thing forfeited. The act of July 13, 1866, seems to forbid it. Such agent is paid for his services, whether his investigation be successful or not, without this additional reward. It hardly seems good policy, after paying such special agent fairly for his serv-

ices, to add the stimulus of a share in the spoils, thus making him a sort of speculator, and laying before him a temptation to carry things beyond just and reasonable bounds. Besides, when this special agent, by any means, discovers a "cause, matter or thing," whereby a fine, penalty or forfeiture has been incurred, has not the government at that moment, in legal contemplation, information of the fact? Is not the knowledge or information in the mind of the special agent identical with knowledge or information on the part of the government? If at that moment the government can be said to be informed, how can the special agent be said to first inform? Is he entitled to the share because he informs himself? Will he be so entitled because, after he has made the discovery and the government has by consequence already received the information, he communicates the fact to some other revenue officer or to the district attorney? Can an informer be rewarded in any case where he gives information to the government after it is in possession of that information?

I know that there are cases in which acts of congress have expressly allowed revenue officers to share as informers. But in regard to frauds of the kind now under consideration, I am not aware of any act expressly making such provision. Nevertheless, as the usage appears to be so, and as this case may well be decided on other grounds, I make no decision on the point whether Mr. Little's claim is precluded merely because he is a special revenue agent.

It is urged by Mr. Little that the claim of Lamb and Chadwick cannot be allowed, because they are too late in preferring it. We have seen that these gentlemen did not bring their claim to the notice of the court till the day before the final judgment was rendered, and then not by asking to be made parties to the original proceeding, but by a petition to be allowed a share in the proceeds of the forfeiture.

In support of this objection we are referred to the case of *Francis v. United States*, 5 Wall., 338. In that case the proceeding was under the act of August 6, 1861. 12 U. S. Stat. at Large, 319. The third section of that act provides that "the attorney-general, or any district attorney of the United States, . . . may institute proceedings of condemnation; and in such case they shall be wholly for the benefit of the United States. Or any person may file an information with such attorney, in which case the proceeding shall be for the use of such "informant and the United States in equal parts." In that case it was held that, under this provision, the informer must become a party to the proceeding in its inception; else the proceeding would "be wholly for the benefit of the United States." This was the necessary result of the words of that act. It made no provision concerning a *first* informer. It contemplates no controversy between different informers. And it provides that unless the information be filed with the attorney for the government, the proceedings shall be wholly for the benefit of the United States. No such provisions are found in the acts under which the present proceedings were had. As we have already seen, these only provide that the first informer — "to be ascertained by the court" — shall be entitled to share in the proceeds. I think, therefore, that the case in 5 Wallace is inapplicable to the point under consideration.

It is true that since, in these cases, informers are liable for costs when the prosecution fails, it would be right to require them to become parties to the proceedings at an early stage. But I do not think that they are bound to be named in the libel. If so, there could be no such contention and decision between different informers, as seems to be contemplated by the one hundred and seventy-ninth section of the act of July 13, 1866. For in that case the

person named in the libel must be taken to be the first informer, and no other person could contest the right with him. Though Lamb and Chadwick came late into the case, I think they are not thereby precluded, especially as they seem to have been prevented from coming earlier by the promise of Little to protect their interests.

The only remaining question is, Who "*first* informed of the cause, matter or thing whereby" the forfeiture in question was incurred? That Little, on the 12th of September, 1867, gave to Williams, the collector, the information on which the prosecution proceeded, and on which the judgment was pronounced, there can be no doubt. That he never, at any earlier date, informed of the facts to any one, is equally certain. Nor can it be claimed that the mere ascertainment by him of the facts on which the forfeiture was adjudged amounted to an information within the meaning of the act of congress. We must therefore consider him as having informed on the 12th of September, 1867, and not before.

Now did Lamb and Chadwick, within the meaning of said act, inform before the 12th of September, 1867? It is certain that whatever information they gave was given before that date; and that prior to that time they informed Giesey, a special revenue agent, Fry, assessor of the district, and Little, another special agent of the revenue, in writing, of facts concerning said forfeiture. Were the facts, thus given in writing to these three revenue officials, such an information as is contemplated by the one hundred and seventy-ninth section of the act of July 13, 1867? If so, they are the first informers. These facts, as we have seen, were a written statement to the effect that Funkhouser & Co. had shipped divers barrels of whisky in duplicate serial numbers in fraud of the revenue. The duplicate serial numbers and the dates of the shipments were stated in the writings; and the writing handed to Little was, under his directions, certified to be true by the party who took the numbers from the barrels.

Such a duplication of numbers is a violation of the thirty-eighth section of the act of July 13, 1867, which requires that all casks or packages of distilled spirits manufactured in any distillery shall be numbered for the current year, beginning with number one for the first cask or package inspected on or after the 1st day of January; and that no two or more casks shall be marked with the same number.

This prosecution was founded on the twenty-fifth section of the act of March 2, 1867 (14 U. S. Stat. at Large, 483). It provides "That the owner, agent or superintendent of any still, boiler, or other vessel used in the distillation of spirits, who shall neglect or refuse to make true and exact entry and report of the same, *or to do or cause to be done anything by law required to be done concerning distilled spirits*, shall, in addition to other fines and penalties now by law provided, forfeit for every such neglect or refusal all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers and other vessels used in distillation," etc.

Thus, we see that by this provision of law, any neglect to perform any requirement of law concerning distilling operates as a forfeiture of the whole concern. The device of the duplicate serial numbers in question was undoubtedly such neglect; for the parties not only neglected to number serially as the law requires, but falsely numbered the casks. This false numbering, therefore, if alone averred in the libel and proved on the trial, would of itself have as effectually worked a forfeiture to the full extent to which it was adjudged,

as it and the four other causes of forfeiture therein averred actually did. It is clear, then, that the information given by Lamb and Chadwick was such information as is contemplated by the one hundred and seventy-ninth section of the act of July 13, 1866; and, to my mind, it is equally clear that Lamb and Chadwick are the first informers within the meaning of that section.

§ 35. *The informer's share is to be taken from the net proceeds of the sale of the property seized. (a)*

A question has been made whether the informers' share shall be taken from the gross or net proceeds. I hold that it must be from the net proceeds. All the expenses of the litigation must be ascertained and deducted from the gross sum on hand. Then the share of Lamb and Chadwick must be proportioned according to the remaining net proceeds, pursuant to the circular of the secretary of the treasury, of August 14, 1866. And the matter is referred to the master to ascertain the share coming to Lamb and Chadwick according to the rules above laid down, and to the provisions of said circular; and he is ordered to report the result to this court.

§ 36. *Who entitled to reward.*—The informer's share is not given to the person who first gives information on which property is seized, but to the person who first informs of the cause, matter or thing whereby the forfeiture was incurred. Thus, where C. gave information in general, without naming any place, and procured an affidavit sworn to by T., setting out certain frauds committed in violation of the internal revenue laws, whereupon the property was seized and a libel filed to condemn it, and R., a special revenue agent, directed to inquire into the matter, discovered evidence of other frauds, by virtue of which the property was condemned, and T. in the meantime having made a second affidavit contradicting his first one, and setting forth that he was drunk when he swore to it, it was held that under the act of June 30, 1864, as amended by the act of July 13, 1866, which is in effect that a share of the forfeiture shall be given to the person "who shall first inform of the cause, matter or thing whereby such fine, etc., shall have been incurred," R. was entitled to such share over C., and that as between C. and T., the latter was entitled to it. *One Hundred Barrels of Whisky*, 2 Ben., 14.

§ 37. The informer is he who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty or forfeiture which is eventually recovered. Thus, where A. and B. claimed to be informers, and the proofs showed that A. procured valuable evidence tending to make out a strong case against the offenders, without which it is doubtful whether any considerable sum would have been recovered; that the fraud, however, was discovered by B., and proceedings commenced in pursuance of that information, and the clue to the offending parties obtained before A. gave any information, B. was held to be entitled to the informer's share. *United States v. George*, 6 Blatch., 406.

§ 38. A party acquiring hearsay knowledge of a vessel being an intended slave-trader while towing her into harbor, immediately upon landing gave information to the United States district attorney and made a sworn statement. The master of the ship immediately upon landing presented his ship's papers at the custom-house and notified the revenue officers of the facts in the case, and on the following day gave intelligence to the attorney. The master being recognized as prosecutor throughout the proceedings, after decree of distribution and payment of the moiety to the master in accordance with the decree, the party first giving information petitions the court to open and set aside the decree of distribution. *Held*, that under the act of April, 1818, the award was properly made, without deciding whether it was competent for the court to open the decree and take jurisdiction of second petitioner's claim. *United States v. Bark Isla de Cuba*, 2 Cliff., 458.

§ 39. One does not become an "informer" so as to entitle him to the informer's share of a forfeiture except by giving the information that secures the condemnation of the property. *Brewster v. Gelston*, 1 Paine, 431.

§ 40. A person whose duty it is to disclose information, and who violates such duty if he does not disclose it, is not as an informer entitled to a share of forfeitures resulting from such information given by him. *Four Cutting Machines*, 3 Ben., 220.

(a) In *One Still, Boiler, etc.*,\* 1 Ben., 874, it was held that the amount of the informer's percentage is to be calculated upon the gross proceeds of the forfeiture, without deducting the costs.

§ 41. Even where the informant is an officer of a revenue cutter it is not necessary that he should accompany his communication by an assertion of his claim to a share of the forfeiture; or that he concern himself with the prosecution by causing its institution, or providing testimony to support it. It is sufficient for him to show that the information which he gave caused the prosecution and recovery. *Sawyer v. Steele*, 3 Wash., 464.

§ 42. A United States marshal having paid one of his assistants in depreciated currency in violation of the provisions of the act of March 3, 1839, *held*, that this assistant was a competent witness against him although an informer, and entitled to a share of the penalty. *United States v. Patterson*, 3 McL., 299.

§ 43. To be a first informer, within the meaning of the statute, the officer must discover the facts whereby the fine, penalty or forfeiture has been incurred, by his own diligence and investigation, otherwise the person through whom he obtains the information is first informer. *Informers' Shares under the Internal Revenue Laws*,\* 13 Op. Att'y Gen'l, 228.

§ 44. Detectives employed in the internal revenue service under the authority of section 50 of the act of July 20, 1868, are entitled to receive informers' shares. *Informers' Shares*,\* 13 Op. Att'y Gen'l, 869.

§ 45. There is a distinction between giving a penalty to a common informer, and imposing one for the benefit of the person aggrieved by the violation of the statute. In the latter case the term *person* might justly be regarded as comprehending every one affected by the injury; because the design of such enactment must be to give a remedy co-extensive with the grievance provided against. This consideration has no relation to positive penalties established as sanctions of law. *Ferrett v. Atwill*, 1 Blatch., 151.

§ 46. The plaintiff in a popular action, that is, one who sues for a penalty given to any person suing for the same, is an "informer" as that term is used in the statutes of the United States. *Pollock v. Steamboat Laura*, 5 Fed. R., 133.

§ 47. Where written information was as follows: "The informer verily believes that certain goods, viz., seven hogsheads of rum, which have been brought into the United States contrary to law are now on board the Tonkin," etc., not only the goods but the Tonkin also being declared forfeited for having on board goods unladen contrary to law, *held*, that she was forfeited in pursuance of the information given, and the informer entitled to a share of such forfeiture; also, that where written information is given, the informer may give parol evidence of other information given leading to the seizure and condemnation of property not mentioned in the written information. *Westcot v. Bradford*, 4 Wash., 492.

§ 48. Officers.—A revenue officer charged with the special duty of searching a vessel in pursuance of definite information given by another person does not become the informer by reason of the diligence, fidelity and success with which he prosecuted the search and found what he was sent to seek. *Fifty Thousand Cigars*,\* 1 Low., 22.

§ 49. Where an inspector of internal revenue at Philadelphia made researches at Philadelphia which were embraced within his duties as inspector, and were carried on by him under the direction of officers of the internal revenue at New York, which resulted in the forfeiture of property for violations of law committed in New York, *held*, that his time and services, as well as the information acquired by him, became *ipso facto* the property of the United States, and that he never acquired any private property in such information so as to allow him any discretion as to communicating or withholding it from his superior officers, and hence was entitled to no share as informer. *Four Cutting Machines*, 3 Ben., 220.

§ 50. Property was seized, condemned and forfeited in pursuance of information given by inspectors of the customs. *Held*, that under the act of March 2, 1789, section 91, providing that when "fines, etc., shall be recovered in pursuance of information given by any person other than the naval officer or surveyor of the district," such informer shall share, notwithstanding the provisions of the act of February 4, 1815; that inspectors of the customs are included in the term "any person," and are not to be barred of their rights as informers by reason of their having received their maximum of compensation allowed by law for their regular services as inspectors. Even if this latter interpretation were not placed upon the law, the court was of the opinion that inspectors need not claim in their quality of officers, but as private individuals. Nor are the inspectors the mere servants and agents of the collectors and surveyors so as to make their information the information of the collectors and surveyors. *Hooper v. Fifty-one Casks of Brandy*, 6 N. Y. Leg. Obs., 302; Dav., 375.

§ 51. Either the collector, naval officer, surveyor, any custom officer, occasional inspectors, officers of a revenue cutter, an authorized agent of the treasury department, or any person specially appointed for the purpose in writing by a collector, naval officer or surveyor, making a seizure, is, under the act of March 2, 1867, entitled to one-fourth of the net proceeds of the fines, penalties and forfeitures where there is no informer other than the collector, naval officer and surveyor, even though such collector, naval officer or surveyor be the one making the capture. *Distributions of Customs Forfeitures*,\* 12 Op. Att'y Gen'l, 291.



§ 52. An officer making a seizure under an order from a collector does not act simply as the agent of the collector, but as an officer, and as such is himself entitled to the one-fourth which goes to the person making the capture. *Ibid.*

§ 53. Internal revenue officers are not to be excluded from claiming and receiving informers' shares. Section 179 of the act of June 30, 1864, as amended by the act of July 13, 1866, is expressly applicable only to cases not otherwise provided for, but where not otherwise provided it is applicable whether the fine, penalty or forfeiture is recovered by indictment or information or action of debt. Informers' Shares under the Internal Revenue Laws,\* 13 Op. Att'y Gen'l, 228.

§ 54. An internal revenue officer who obtains information of a violation of the internal revenue laws by an examination of books and premises, in the manner authorized by section 87 of the act of June 30, 1864, section 5 of the same act as amended July 13, 1866, section 31 of the act of July 13, 1866, and section 45 of the act of July 20, 1868, is entitled to an informer's share of the proceeds of the fine or forfeiture. Informers' Shares,\* 13 Op. Att'y Gen'l, 369.

§ 55. Where a deputy collector under the internal revenue law happened to observe some barrels of whisky unloading at a warehouse in B., within his district, and that they were not properly branded, gave information to the collector, which resulted in their forfeiture, *held*, that he was an informer under the statute of July 13, 1866. (*United States v. 100 Barrels Distilled Spirits*, 8 Int. Rev. Rec., 20, cited and affirmed.) *United States v. 34 Barrels Whisky*,\* 9 Int. Rev. Rec., 169.

§ 56. Information; sufficiency.—The law does not require that the information shall be as full as the evidence which may be given or which may be necessary to establish the forfeiture. It is sufficient if it be acted upon, induces the prosecution and contributes eventually to the recovery. *Sawyer v. Steele*, 3 Wash., 464.

§ 57. To entitle a person to a share as informer, the information must be voluntarily given for the purpose of having it acted upon. It must be given to some person representing the United States and must actually, directly and proximately lead to the recovery of the fine, penalty or forfeiture, or the money paid in lieu thereof. Informers' Shares under the Internal Revenue Laws,\* 13 Op. Att'y Gen'l, 228.

§ 58. Liability of collector to informer.—A collector is not responsible to an informer for such parts of the proceeds of a forfeiture as he had paid over to other custom-house officers as their share before he received notice of the informer's claims. *Sawyer v. Steele*, 3 Wash., 464.

§ 59. After money has been paid over to the collector, it is beyond the reach of the court, and no decree *in personam* against the collector, nor against money to which he is entitled in the hands of the clerk on the common law side of the court, can be made in favor of an informer. If an informer is entitled to money thus in possession of the collector, his only remedy is an action at law against the collector for money had to his use. *Westcott v. Bradford*, 4 Wash., 492.

§ 60. Share of informer.—Where suits *in rem* were instituted against property which resulted in forfeitures, and the sum fixed upon by compromise and paid into the registry was based partly on penalties and partly on taxes due, *held*, that the informers were entitled to a share of the gross sum paid, a part of which was designed to cover taxes. *United States v. Krum*, 3 McC., 381.

§ 61. Where under the act of June, 1864 (13 U. S. Stat. at Large), as amended by the act of July 13, 1866 (14 id., 145), empowering the secretary to provide general regulations determining the informer's share, and the following schedule was prepared: "Of the first \$500 of any penalty, the informer shall receive fifty per cent.," etc., the informer's percentage of the fine, penalty or forfeiture is to be calculated upon the gross amount received and not upon the net amount after deducting the costs of the proceeding. *United States v. One Still, Boiler, etc.*,\* 6 Int. Rev. Rec., 59.

§ 62. Vested right of informer.—The right of an informer to the proceeds of a forfeiture becomes vested when the money is received by the marshal, and his right is not affected by a subsequent regulation of the treasury department. *United States v. Twenty-five Thousand Cigars*,\* 5 Blatch., 500.

§ 63. An informer, in the case of a sale by the marshal of forfeited property under a *venditioni exponas*, becomes entitled to his share of the proceeds thereof when such proceeds are paid to the marshal. His share then becomes vested, and is determined by existing regulations, and cannot be affected by regulations subsequently made. *Eight Barrels of Distilled Spirits*,\* 1 Ben., 472.

§ 64. Where proceedings are instituted against property under the act of August 6, 1861, which provides that the property of any person who knowingly uses or consents to the use of the same in aiding or abetting insurrection against the United States shall be subject to forfeiture and confiscation upon libel filed, the United States, represented by the district attorney, is the prosecuting party, and the informer who filed the information with the United States

attorney has no vested interest in the subject-matter of the suits. Hence the attorney general may, against the interest of an informer, ask a dismissal of an appeal from the court below where the decree, having been against the government, it had appealed. For the same reasons a motion by the attorney-general to the effect that the decree of the circuit court, which was in favor of the United States, should be reversed and the cause remanded with a view to its dismissal in the court below, was granted. *Confiscation Cases*, 7 Wall., 454.

§ 65. Prior to the decree for distribution, the interest of the informer is conditional and continues to be so until the money is paid over as required by law. *Ibid.*

§ 66. Where judicial proceedings being instituted against a distillery and a certain amount of distilled spirits to have the same forfeited upon information furnished by officers of the internal revenue service, and while these suits are pending, and before condemnation, the case is compromised by the commissioner of internal revenue by and with the consent of the secretary of the treasury, in such a manner that the owners of the property pay the amount of taxes due on the spirits and a certain additional sum as penalties, which latter sum the secretary of the treasury divides with the revenue officers but retains the former amount paid as taxes, *held*, that under the act of June 30, 1864, section 44 (13 Stat. at Large, p. 239), authorizing the commissioner of internal revenue and the secretary of the treasury to "compromise" all suits "relating to internal revenue," the commissioner and secretary had a right to compromise the suit and require as a condition of it that the taxes due on the property seized should be paid, and that the informers had no right to any portion of such sum paid as taxes. *Dorsheimer v. United States*,\* 2 Ct. Cl., 103.

§ 67. Where a vessel was condemned for violating an act of congress, and the president remitted the forfeiture "as far forth as the United States were interested therein," *held*, that the United States were interested only in one-half of the forfeiture, and that only one-half was remitted. *United States v. Teaton*, 2 Cr. C. C., 73.

§ 68. Proceedings being instituted against property on account of acts done by the owner in aid of the late rebellion, and the owner being pardoned for his offenses before the final distribution of the forfeiture unless actually paid over into his hands, the informer has no vested right in the property or its proceeds, such as to prevent the pardon from restoring it to the original owner. *Brown v. United States*, *McCahon*, 229.

§ 69. The share of an informer under the revenue laws becomes vested only when the money is actually paid over for distribution, for until that time the whole matter is in the hands of the government exclusively, and it may remit the forfeiture altogether. About Twenty-five Thousand Gallons of Distilled Spirits, etc.,\* 1 Ben., 367.

§ 70. A court may set aside a decree of forfeiture under the revenue laws without the consent of the informer. *Ibid.*

§ 71. The share of an informer is governed by the law in force at the time of the final decree of forfeiture and distribution. *Ibid.*

§ 72. The right of an informer to money paid into court to release property seized does not attach till the final order of distribution is made, even though the owner has consented to the condemnation of the whole property. *Ibid.*

§ 73. Jurisdiction.—Courts of common law as well as courts of equity and admiralty possess controlling power over money brought into those courts by their process, and the eighty-ninth section of the collection law of the 2d of March, 1799, chapter 128, authorizing the collector to receive from the court or its officer and distribute sums recovered, does not oust the jurisdiction of the court to examine and adjust contested claims of informers and others to the money. *Westcot v. Bradford*, 4 Wash., 492.

§ 74. Forfeiture of share by misconduct.—Where an informer, who, after seizure, was intrusted with the care of the property, made unsuccessful attempts, in collusion with the owner, to defraud the United States of the revenue thereon, *held*, that his misconduct as agent did not defeat his rights as informer where the property was subsequently forfeited. *Ibid.*

§ 75. Bail bonds.—Amounts recovered by the government on forfeited bail bonds are not "fines, penalties or forfeitures" within the fourth section of the act of June 22, 1874, and an informer is not entitled to a share thereof. *In re Brittingham*,\* 5 Fed. R., 191.

§ 76. Under the customs law of 1799, though the informer would be entitled to a share of a penalty in case of conviction, he is entitled to no share of a sum paid by the bail of the defendant in consequence of his failure to appear. *United States v. Fanjul*,\* 1 Low., 117.

§ 77. Act of June 16, 1880.—The secretary of the treasury is not authorized to give rewards to informers by the act of June 16, 1880, and the provisions of that act relating to the expenses of securing convictions do not embrace the compensation of informers. *In re Brittingham*,\* 5 Fed. R., 191.

§ 78. Costs of prosecution, how paid.—As to whether, in a case arising under the internal revenue laws, where the value of the forfeited property is less than \$250, the portion of the forfeiture which accrues to the United States shall be applied to the costs of the prosecution,

as is provided in the ninety-first section of the act of 1799, or whether, as provided in the treasury regulations of September 2, 1867, the share allotted to the informer shall be subject to a proportionate deduction for costs and charges, the court held that the provision in the ninety-first section of the act of congress of March 2, 1799 (1 Stat. at Large, p. 697), is general in its effect, applicable to all cases, and not intended to be confined to forfeitures which might arise under the act containing the proviso or any other particular act, and that until repealed the act of 1799 must be held to be controlling, in all cases to which its terms apply, as well when the case arises under the internal revenue laws as those under the customs laws, and that treasury regulations issued under the authority of the ninth section of the act of July 13, 1866 (14 Stat. at Large, p. 145), are not binding in cases that come within the provisions of that act, but that the appropriation of the government's share of the forfeiture must be made. *One Large Water Tub, etc.*, 3 Ben., 486; 10 Int. Rev. Rec., 189.

§ 79. *Sum due by bond.*—The sum for which parties become bound by bond given in accordance with the provisions of the act of congress of December 31, 1792, chapter 45, section 7, to prevent the misuse of the register of any ship or vessel, is a penalty, a fixed and certain punishment for an offense, and not a liquidated amount of damages due upon a contract, although the amount is recovered in a contract action. Hence the sum secured by bond given under that act is to be distributed as a penalty or forfeiture, one moiety to go to the collector, naval officer and surveyor. *United States v. Montell, Taney*, 47.

§ 80. *An informer may be a witness* although he receives a part of the penalty, upon the ground of necessity and public policy. *United States v. John Patterson*, 3 McL., 53.

§ 81. *Suit by informers for share.*—In an action by officers of a revenue cutter against the collector to recover their share of a forfeiture as informers, it is not necessary that their commissions be given in evidence. It is sufficient that their character and the capacity in which they acted appear from other sources. *Sawyer v. Steele*, 3 Wash., 464.

§ 82. *In admiralty.*—In the absence of a statute authorizing it, a court of admiralty cannot reward an informer in case of a condemnation of a vessel for trading with the enemy. *The Langdon Cheeves*,\* 2 Mason, 85.

§ 83. *Waiver.*—The consent of the informers, officers of a revenue cutter, to the removal of the suspected vessel and cargo from one district to another, does not amount to a waiver of their right to a share of the sum recovered. Nor does a disavowal by them of having instituted the suit. *Sawyer v. Steele*, 3 Wash., 464.

§ 84. *The proceeds of forfeitures are subject to the control of the court until they pass into the treasury of the United States.* *United States v. Hook*,\* 3 Pittsb. R., 54.

§ 85. *Distinction between forfeitures and penalties.*—On condemnation and forfeiture of property for violation of the United States internal revenue laws an informer is entitled under the act of 1864 to one moiety of the proceeds, the act making no distinction between forfeitures and penalties. *Ibid.*

§ 86. *Distribution of proceeds.*—The act of July 13, 1866 (14 Stat. at Large, 184), which provides that if any certificate of registry, or document granted in lieu thereof to any vessel, "shall be knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, etc., shall be liable to forfeiture," is not an act relating to the customs within the meaning of the act of March 2, 1867, under which the proceeds of forfeitures must be transferred to the treasury of the United States to be distributed by the secretary of the treasury. Hence the proceeds of forfeitures under the former act are to be paid directly by the court. *The Brig Monte Christo*, 6 Ben., 327.

§ 87. *Property being declared forfeited for violations of the third section of the act of August 6, 1846* (9 U. S. Stat. at Large, 54, 55), upon the question whether, under the act of 1867, which provides that the proceeds of forfeitures "shall be paid into the treasury of the United States and distributed under the direction of the secretary of the treasury," the secretary has power to determine who is the informer, or whether the court has jurisdiction to determine the matter, it was held that as the jurisdiction of the court is clearly established under the act of 1799, providing that the collector "pay and distribute" the proceeds "according to law," there is nothing in the act of 1867 taking away this well established jurisdiction, or which confers on the secretary of the treasury any more power to decide disputed claims than the collector had under the act of 1799; that the proper practice under the act of 1867 is for the net proceeds to be paid over to the collector, to be by him paid over into the treasury of the United States, to be then distributed under the directions of the secretary of the treasury to the persons and in the proportions prescribed by the decree of the court. *United States v. George*, 6 Blatch., 37; 9 Int. Rev. Rec., 187.

§ 88. *Where there is neither an informer nor a seizing officer entitled to a share, the proceeds should, under the ninety-first section of the act of 1799, first making the deductions required by the first section of the act of 1867, be apportioned as follows:* "One moiety to the United States, the other moiety to the custom-house officers; that is, the collector, naval offi-

cer, and surveyor of the district where the forfeiture shall have been incurred, or such of them as may be in said district." Distributions of Customs Forfeitures,\* 12 Op. Att'y Gen'l, 291.

§ 89. Money recovered on an export bond, given under the regulations concerning internal revenue bonded warehouses, belongs exclusively to the United States, and no informer or revenue officer is entitled to a share therein under the act of March 2, 1867 (14 Stat., 546). Internal Revenue,\* 13 Op. Att'y Gen'l, 115.

§ 90. Right of government to sue under steamboat act.—Under the forty-first section of the steamboat act of 1852, providing that "all penalties imposed by this act may be recovered in an action of debt by any person who will sue therefor," the government, although it is not a person within the meaning of the act, and hence cannot sue as informer, is not precluded from bringing any other action, even an action of debt, independent of this act. United States v. Bouger. 6 McL., 277.

§ 91. Costs.—Under the eighth section of the act of February, 1799, which provides "if any informer on a penal statute, and to whom the penalty or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution or shall be nonsuited in the same, or if, upon trial, judgment shall be rendered in favor of the defendant, unless such informer be an officer of the United States, he shall be alone liable to the clerks, marshals and attorneys for the fees of such prosecution," the informer, if not an officer, alone is liable for costs although the United States is a party to the record. He may also be required to give security for costs, and if he refuses to do so his name will be stricken from the record, and no portion of the proceeds of the forfeiture allowed him, if the suit be successfully prosecuted. United States v. The Steamboat Planter, Newb., 263.

§ 92. Property liable to confiscation under the confiscation act of August 6, 1861, cannot, hostilities having ceased, be the basis of a valid claim by an informer to a moiety under that act, the complete title to the property having passed to the government as soon as hostilities ceased. So where proceedings of condemnation were instituted against property in the possession of Union forces at the close of the war, in behalf of the United States and an informant, the United States were not estopped by those proceedings from denying, as against the informer, that the property was the subject of forfeiture. Nor was there an estoppel in favor of this informer because the commissioner of the freedmen's bureau, whose duty it was to control and manage property of the character proceeded against, omitted to appear and resist the judgment of condemnation, and after the sale was made applied for and received from the court one-half the proceeds. Titus v. United States, 20 Wall., 475.

§ 93. Appeal.—After condemnation upon a seizure for violation of the internal revenue laws, a petition by an informer to be paid his proportion of the forfeiture is in the nature of an original suit, and from a decree affecting such petition an appeal will lie to the circuit court. Westcot v. Bradford, 4 Wash., 492.

§ 94. But where the petition claims a share of the penalty recovered on a coasting license bond, the proceeding is one at common law, and the decree of the court upon such petition cannot be carried by appeal into the circuit court. *Ibid.*

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## INHIBITION.

See WRITS.

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## INJUNCTION.

See BONDS, p. 786; DEBTOR AND CREDITOR, XXI; EQUITY, III; PATENTS, p. 315.

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## INJURIES.

See TORTS.

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## INLAND WATERS.

See MARITIME LAW: WATER-COURSES.

## INNKEEPERS.

§ 1. **Liability.**—An innkeeper who sets up a statute as relieving him from a common law liability must show a literal compliance with the terms of the statute on his part. *Myers v. Cottrill*, \* 5 Biss., 465.

§ 2. If a person, a guest at a hotel, takes to his room valuable merchandise which is not part of his baggage, and keeps it there for show and sale, and from time to time invites parties into his room to inspect and purchase, unless there is some special circumstance showing that the landlord assumed the responsibility as for ordinary baggage as to such merchandise, he would not be liable as an innkeeper. The innkeeper in such a case is only responsible for the negligence of himself and his servants, and the owner of the goods cannot recover if he was himself guilty of negligence. *Ibid.*

§ 3. The statute of Wisconsin relating to the liability of innkeepers for money, jewelry and articles of gold or silver manufacture, etc., does not apply, in case a safe for their safe-keeping is provided, to articles of that description belonging to a guest which he has in his possession as merchandise and not as baggage; the innkeeper would be liable, however, in case of negligence on the part of himself or his servants. *Ibid.*

§ 4. Under the statutes of Illinois where an innkeeper has provided a safe for the keeping of money, jewels, and the like, and the notice is given as required by law to deposit such articles with the landlord for safe-keeping in such safe, a guest failing to so deposit such articles, and leaving them in a valise in the coat-room, must bear his own loss. *Elcox v. Hill*, \* 8 Otto, 218.

§ 5. Where the loss of the property of a guest at an inn is occasioned by the negligence of the guest himself the innkeeper is not liable. *Ibid.*

§ 6. **Whether a place is an inn.**—The intent of the party, manifested by his acts, must decide whether his house is kept as a common inn, into which all travelers have a right to enter and demand accommodation, or a boarding-house in which the keeper has a right to select his guests. *Beall v. Beck*, 8 Cr. C. C., 666. A restaurant may or may not be an inn. *Lewis v. Hitchcock*, 10 Fed. R., 4.

§ 7. **Civil rights.**—In North Carolina the equal rights, in inns and public conveyances, of all persons regardless of color, was protected by state laws, and the only effect of the civil rights bill was to give the federal courts jurisdiction of wrongs committed against citizens on account of color or class. The Civil Rights Bill, 1 Hughes, 541.

§ 8. A sleeping car company, *semble*, is not liable either as innkeeper or common carrier. *Blum v. Southern Pullman, etc., Co.*, 1 Flip., 500.

§ 9. The right of an innkeeper to detain a horse for his food does not extend to horses owned by individuals and employed in the transportation of the mail, nor to horses owned by the United States and employed in that service. *United States v. Barney*, 2 Wheeler, 618.

## INNOCENT PARTIES.

See CONTRACTS; NOTICE.

## INNOCENT PURCHASERS.

See BILLS AND NOTES; BONDS; LAND; NOTICE.

## INSANITY.

[See CRIMES, XXXII; EVIDENCE. As to capacity of testator, see ESTATES OF DECEDENTS.]

**SUMMARY**—*Power of attorney by lunatic*, §§ 1, 4.—*Capacity to transact business*, §§ 2-7.—*As to making wills and contracts*, § 4.—*Presumption of sanity; burden of proof*, §§ 5, 8, 9, 11.—*Evidence as to validity of act by an alleged insane person*, §§ 6, 7, 9.—*Petition by guardian to sell lands*, § 10.—*Motion for new trial on the ground of insanity of accused*, § 11.

§ 1. A power of attorney executed by a lunatic or person of unsound mind is absolutely void and not merely voidable. *Hall v. Unger*, §§ 12-22.

§ 2. Insanity on one subject does not in law totally disqualify a person for the transaction of business. He may be perfectly sane on other subjects, and as to these is capable of transacting business. *Ibid.*

§ 3. In determining the ability of an alleged insane person to perform any particular act the inquiry should be, first, what degree of mental capacity is essential to the proper execution of the act in question; and, second, whether such capacity was possessed at the time by the party. *Ibid.*

§ 4. Though in general it requires a higher degree of mental capacity to make a contract than a will, yet it requires no higher capacity to execute a power of attorney to sell land than to execute a will to devise it. It is sufficient if the party has sufficient mind and memory to understand the nature of the business he was engaged in, to know the character and location of the land and the object and effect of the act he was doing. *Ibid.*

§ 5. The law presumes that every adult is sane, and the burden of proof to show insanity rests on the party asserting it. If the validity of an act is assailed it must be shown that the person was insane at the time of performing the act. If, however, habitual insanity is shown, the burden of proof is on a person asserting the validity of the act to show capacity at the time it was done. *Ibid.*

§ 6. In considering the validity of an act done by an alleged insane person regard may be had to the reasonableness of the act itself and its approval by the family and relations of the party. The reasonableness of the act and such approval will not validate the act if the person was at the time insane, but it may be considered as showing that at the time his family and relatives did not regard him as insane. *Ibid.*

§ 7. The legal presumption of the competency of a person executing an instrument is strengthened by the attestation and witnessing thereof by an officer. *Ibid.*

§ 8. The presumption is always in favor of mental capacity, and he who alleges the contrary, for the purpose of invalidating a deed or will, must prove it. But if a state of general derangement or incapacity of mind be proved at any time prior to the act which is attempted to be invalidated, the burden of proof is shifted; and the person offering the validity of the conveyance must prove the mental capacity of the grantor or deviser to do the act at the time it was executed. *Hoge v. Fisher*, §§ 23, 24.

§ 9. Where the act of a person once shown to be insane is sought to be sustained, it is not sufficient to show that he could return appropriate answers to plain and common questions. It must be proved that at the time he was of sound mind and disposing memory. *Ibid.*

§ 10. Under the statutes of Wisconsin the publication of the notice of the hearing of the petition of the guardian of an insane person to sell the lands of the ward for the payment of debts and the expenses of maintenance is only intended for the protection of parties having interests adverse to the ward. It is not essential to the jurisdiction of the court, and the lunatic after recovery cannot attack the sale for want of it. *Mohr v. Manierre*, §§ 25, 26.

§ 11. On a motion for a new trial of a defendant, on a criminal charge, on the ground that at the time of trial he was insane, it must be shown that at the time of his trial he was so far of unsound mind as to be incapable of comprehending the nature of the charge against him, and of properly presenting his defense. In such a case the burden of proof of showing insanity is on the defendant, but if there exists a reasonable doubt of his sanity the defendant is entitled to the benefit of it. *United States v. Lancaster*, §§ 27, 28.

[NOTES.—See §§ 29-32.]

#### HALL v. UNGER.

(Circuit Court for California: 4 Sawyer, 672-687. 1867.)

Charge by FIELD, J.

STATEMENT OF FACTS.—This is an action of ejectment to recover the possession of a one hundred vara lot, situated on the northerly side of Bryant street, near First street, in this city. The plaintiffs claim the property as the heirs of John Hall, deceased. In support of their claim they have produced a grant of the premises issued to Hall by Alcalde Leavenworth, on the 30th of December, 1848, and have proved its genuineness and due execution; they have shown the marriage of Hall with their mother, Mary K. Hall, and that they are the children of this marriage. John Hall died in September, 1860, and Mary K. Hall has died during the pendency of the present action. At the death of their father the plaintiffs were all minors, the eldest being twenty

years, and the youngest nine years of age. The property granted, assuming that the grant was valid, was the separate property of Hall, and by the law of descents and distributions of this state, whatever interest he then possessed passed, upon his death, one-third to his surviving wife, and the remainder in equal shares to the children. On the death of the wife her interest also went to the children, so that now the entire estate which he possessed in this property at his decease, assuming that he possessed any, is vested in the plaintiffs.

§ 12. *San Francisco alcalde titles, under the Van Ness ordinance and the legislation confirming it, pass an absolute estate.*

It is not necessary to consider whether American alcaldes in the city of San Francisco, after the cession of California to the United States, possessed any power to make grants of land. So far as this case is concerned it is immaterial whether they did or did not possess such power. The subsequent action of the authorities of the city of San Francisco, and the confirmatory legislation of the state, together with the action of congress, have given to the holders under alcalde grants, recorded like the one in suit, an absolute and indefeasible estate, even if they acquired originally no title whatever by the grants.

By the ordinance of the common council of the city of San Francisco, commonly designated, from the name of its reputed author, the Van Ness ordinance, the city relinquished and granted all her right and claim to the lands within her corporate limits, as defined by the charter of 1851, to the parties in the actual possession thereof, by themselves or tenants, on or before the 1st day of January, A. D. 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; but at the same time the ordinance declared that all persons who held title to lands within said charter, lying east of Larkin street and northeast of Johnson street, by virtue of any grant made by any ayuntamiento, town council or alcalde of the pueblo, after the 7th of July, 1846, and before the incorporation of the city, which grant, or the material portion thereof, was registered or recorded in a proper book of records — deposited in the office or custody or control of the recorder of the county of San Francisco — on or before April 3, 1850, should for all the purposes contemplated by the ordinance “be decreed to be possessors of the land” granted, although the land might be in the actual occupancy of persons holding the same adverse to the grantees. In other words, the ordinance declared that the title to the city, whatever it may have been, should go to the parties in actual possession at a designated period, and that the holders under alcalde grants, which were, previous to April 3, 1850, registered or noted in books deposited in the recorder’s office, should be deemed such possessors for the purposes of the ordinance.

In this case it has been shown that the grant was registered in a proper book at the time or soon after its execution in 1848, and that this book was deposited in the office of the recorder on its establishment in April, 1850. The Van Ness ordinance did, therefore, if it were valid, transfer to and vest in John Hall (had he not previously disposed of the premises) all the right and title of the city. But lest the action of the common council, in passing this ordinance, might have been in excess of their authority, application was made to the legislature of the state for its confirmation, and on the 11th of March, 1858, the legislature ratified and confirmed it.

But, notwithstanding this legislation, there were numerous persons — some of them among our ablest lawyers — who denied that there was any title in

the city which she could relinquish, and insisted that all the lands within the corporate limits belonged to the United States. The framers of the ordinance also appear to have entertained some doubts on this subject, for they provided in the tenth section that application should be made, not merely to the legislature of the state for confirmation, but to congress, "to relinquish all the right and title of the United States to the said lands for the uses and purposes" mentioned in the ordinance.

Affected by similar doubts, and in order to give quiet and security to the parties holding under the Van Ness ordinance, one of our senators introduced a bill into congress containing a clause relating to these lands. The bill became a law on the 1st of July, 1864, and by it all the right and title of the United States to lands within the corporate limits of the city, as defined by the charter of 1851, with certain reservations not material to this case, were ceded to the city and its successors for the uses and purposes specified in the Van Ness ordinance.

Thus, gentlemen, you will perceive that all the possible sources of title to lands, namely, the city as successor to the pueblo, the state and the United States, have united to vest an absolute and indefeasible estate in the claimant under the alcalde grant in question. The defendants being in possession of the premises when this action was instituted, the case of the plaintiff is thus *prima facie* made.

To meet the case thus presented, the defendants have produced and given in evidence a power of attorney, purporting to be executed by John Hall, on the 27th of December, 1852, to one James W. Harris, empowering him to sell and convey the real property in controversy, and also to appoint a substitute to act for him. This power bears a certificate of due acknowledgment before a commissioner of California, resident in Pennsylvania. They have also produced a substitution of the power of one David B. Rising, and a conveyance of the premises by Rising, acting under this substitution, to Daniel D. Page, under whom they claim. This power the plaintiffs assail, contending that, at the time it purports to have been executed, Hall was insane, and incapable, by reason of his insanity, from attending to any business.

Gentlemen, I do not propose to attempt any nice or philosophical exposition of the subject of insanity. I should certainly fail if I made the attempt; and if I could succeed, the result would not be of any service to you in determining this case. Any elaborate and extended dissertation, if it were possible for me to present such a one, would only tend to perplex and confuse your minds. I shall make a few plain observations on this subject, and refer to the rules laid down by the authorities to guide you in considering it, and then call your attention briefly to the evidence in the case.

### § 13. *Different forms of insanity.*

The physicians who have been examined, and the text-writers, declare that it is impossible to give any consistent definition of insanity; that no words can comprise the different forms and characters which this malady may assume. The most common forms in which it presents itself are those of mania, monomania and dementia. All these imply a derangement of the faculties of the mind from their normal or natural condition. Idiocy, which is usually classed under the general designation of insanity, is more properly the absence of mind than the derangement of its faculties; it is congenital, that is, existing at birth, and consists not in the loss or derangement of the mental powers, but in the destitution of powers never possessed. Mania is that form of insanity



where the mental derangement is accompanied by more or less of excitement. Sometimes the excitement amounts to a fury. The individual in such cases is subject to hallucinations and illusions. He is impressed with the reality of events which have never occurred, and of things which do not exist, and acts more or less in conformity with his belief in these particulars. The mania may be general and affect all or most of the operations of the mind; or it may be partial, and be confined to particular subjects. In the latter case it is generally termed monomania.

Dementia is that form of insanity where the mental derangement is accompanied with a general derangement of the faculties. It is characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events. "In dementia," says Ray, a celebrated writer on medical jurisprudence, "the mind is susceptible of only feeble and transitory impressions, and manifests but little reflection even upon these. They come and go without leaving any trace of their presence behind them. The attention is incapable of more than a momentary effort, one idea succeeding another with but little connection or coherence. The mind has lost the power of comparison, and abstract ideas are utterly beyond its grasp. The memory is peculiarly weak — events the most recent and most nearly connected with the individual being rapidly forgotten. The language of the demented is not only incoherent, but they are much inclined to repeat isolated words and phrases without the slightest meaning."

§ 14. *Derangement of mind on one subject may be consistent with capacity to act on other subjects.*

These common forms of insanity, mania, monomania and dementia, present themselves in an indefinite variety of ways, seldom exhibiting themselves in any two cases exactly in the same manner. Mania sometimes affects, as already observed, all the operations of the mind; and sometimes the mental derangement appears to be limited to particular subjects. An absence of reason on one matter, indeed on many matters, may exist, and at the same time the patient may exhibit a high degree of intelligence and wisdom on other matters. The books are full of such cases. Many of them have been cited by counsel on the argument. They show, indeed, a want of entire soundness of mind; they show partial insanity, but this does not necessarily unfit the individuals affected for the transaction of business on all subjects. In a case which arose in the prerogative court of England (*Dew v. Clark*, 3 Addams' Eccl. R., 79), it was said by counsel that partial insanity was something unknown to the law of England. To this suggestion the court replied: "If he meant by this that the law of England never deems a person both sane and insane at the same time upon one and the same subject, the assertion is a mere truism. But if by that position it be meant and intended that the law of England never deems a party both sane and insane at different times on the same subject, and both sane and insane at the same time on different subjects, there can scarcely be a position more destitute of legal foundation, or rather there can scarcely be one more adverse to the current of legal authority." In that case the court cited the language of Locke, that "a man who is very sober and of a right understanding in all other things, may, in one particular, be as frantic as any man in bedlam;" and of Lord Hale, who says: "There is a partial insanity of mind and a total insanity; in the first as it respects particular things or persons, or in respect of degrees, which is the condition with very many, especially

melancholy persons, who for the most discover their defect in excessive fear and grief, and yet are wholly destitute of the use of reason."

So, too, in dementia, where there is a general enfeeblement of the mental powers, there is not usually weakness exhibited on all subjects, nor in all the faculties. Those matters which, previous to the existence of the malady, the patient frequently thought of and turned over in his mind, are generally retained with greater clearness than less familiar objects. One faculty may be greatly impaired, the memory, for example, while other faculties retain some portion of their original vigor. The disease is of all degrees, from slight weakness to absolute loss of reason. The enfeeblement usually progresses gradually through a twilight, as it were, of reason, before the darkness of night settles upon the mind.

§ 15. *Mental capacity to execute a power of attorney. What is essential to the proper execution of such an instrument.*

It is important to bear these observations in mind, for it does not follow from the fact that mania or dementia be shown that there may not be reason or capacity for business on some subjects. In determining the ability of the alleged insane person to execute any particular act, the inquiry should first be, what degree of mental capacity is essential to the proper execution of the act in question, and then whether such capacity was possessed at the time by the party. It is evident that a very different degree of capacity is required for the execution of a complicated contract and a single transaction of a simple character, like the purchase or sale of a lot. The act done in the case at bar was the execution of a power of attorney to sell three lots in San Francisco. The act required no greater exercise of reason than is essential to the valid execution of a will of real property, and the authorities which determine the degree of capacity essential in such cases may properly be relied upon as furnishing the proper rule in this case. And those authorities concur, especially the later authorities, substantially in this: that it is only necessary to the validity of the will that the testator had sufficient mind and memory to understand the business upon which he was engaged and the effect of the act he was doing. "He must," in the language of Judge Washington, in *Harrison v. Rowan*, 3 Wash., 585 (Est. of Dec., §§ 1074-84), "have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed — the distribution of his property in its simple forms. It is the business of the testator to dictate the purposes of his mind, and of the scrivener to express them in legal form."

It is true, as stated by counsel, that the authorities generally go to the extent that it requires less intelligence and reason to make a will than to execute a contract; but for the execution of an act of a simple character, not involving complicated details and provisions, the rule laid down by Judge Washington is sufficiently stringent. According to that rule it was material to the valid execution of the power in this case that Hall should at the time have possessed sufficient mind and memory to understand the nature of the

business he was engaged in, to know the character and location of the property, and the object and effect of the act he was doing; in other words, it was essential that he should recollect that he was the owner of the property mentioned, that such property was situated in the city of San Francisco, and that the instrument conferred authority for the sale of the same.

§ 16. *The presumption of law is that every man is sane. The burden of proof is upon the party alleging insanity to prove it. Aliter if the insanity is habitual.*

In considering this case it is to be remembered that the law presumes every adult man is sane and possessed of the absolute right to sell and dispose of his property in whatever way he may choose,—his will, in every case, standing as the reason of his conduct. Whoever denies his sanity must establish his position; the burden of proof rests upon the party who alleges the mental derangement. And if, as in the present case, the validity of a particular act is assailed, the assailant must establish that at the time the act was done the insanity existed. Testimony as to previous or subsequent insanity will not answer, unless the insanity be shown to be habitual; that is, such as is in its nature continuous and chronic. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. The case is, however, otherwise, when such habitual insanity is shown to have existed; then the presumption is that the party was insane at the time, and the burden of proof rests with those who allege the party's competency.

§ 17. *Insanity may be inferred from circumstances.*

Again, in considering whether a particular act, assailed for the alleged insanity of the party, was valid or not, regard must be had, in the absence of direct testimony on the point, to all the attending circumstances, the reasonableness of the act in itself, and its approval by the family and relations of the party. The reasonableness of the act and the approval of the family and relatives will not render the act valid if the party were at the time insane, but they are circumstances tending to show that the party was not at the time incompetent, and that his family and relatives did not so regard and treat him. In this case it appears that the lot in controversy was at the time in the adverse possession of others, and that the supreme court of the state had decided that alcalde grants conferred no title. A sale of his interest, if anything could be obtained for it, under the circumstances, would seem to have been a judicious and a wise step.

§ 18. *The duty of an officer taking an acknowledgment of an instrument with reference to the mental capacity of the party.*

The only testimony which relates directly to the time of the execution of the power is that of Broadhead, the witness to the instrument, and the officer before whom it was acknowledged. It was the duty of this officer to satisfy himself of the competency of Hall before attesting the instrument. As said by the supreme court of Pennsylvania, in *Werstlee v. Custer*, 10 Penn., 503, "no honest man will subscribe as a witness to a will or any other instrument executed by an insane man, an imbecile, an idiot, or a person manifestly incompetent, for any reason, to perform, with legal effect, the act in question. A duty attaches to the witness to satisfy himself of the competency of the party before he lends his name to attest the act. Like the magistrate who takes the acknowledgment of a deed, he is to be reasonably assured of the facts he undertakes to verify, else he makes himself instrumental in a fraud

upon the public. And, therefore, the legal presumption, always favorable to competency, is greatly strengthened by the fact of attestation by witnesses."

Such is the general effect of the attestation of a witness and officer; but whether the attestation in the present case, under the peculiar circumstances in which it was made, can add anything to the legal presumption of competency may well be doubted. It is a circumstance worthy of consideration whether the commissioner should have gone to the asylum to take the acknowledgment of an inmate of the institution, with whom he had no previous acquaintance, without information from the officers of the institution that the patient at the time was in possession of sufficient reason to understand the business which it was proposed he should execute.

Broadhead testifies that he went to the Frankford asylum to take the acknowledgment of Hall, with whom he was not previously acquainted; that he read the power to Hall, and handed it to him to read, and asked him if he understood it; that Hall replied "perfectly," or words to that effect; and that the property was valuable, and that he wanted it sold for the benefit of his wife and children. The commissioner also testifies that he could not have believed Hall was on all subjects of sound mind, from the simple fact that he was an inmate of the asylum, but as to the power of attorney, Hall was clear as to what he was giving; that there was nothing in his appearance which led the commissioner to suppose he was insane, and from the fact that he stated that he wanted the property to be sold, the commissioner was led to believe he had a lucid interval. The witness adds that he would not have permitted Hall to execute the instrument, and he would not himself have taken the acknowledgment, unless Hall had been of sufficient mind, memory, judgment and understanding to execute such a paper.

Aside from the peculiar circumstances under which the commissioner acted, there is one fact in his testimony which should be considered by you as throwing possibly some light on the condition of Hall's mind at the time somewhat in conflict with the commissioner's own opinion. He states that Hall at first wrote something besides his signature to the instrument. The instrument itself shows that there has been an erasure of something near the signature. The commissioner states, as his impression, that Hall wrote some other name than his own. This is at least a singular circumstance, if, as stated by the commissioner, he had heard the instrument read, and perfectly understood its purport.

We will now briefly refer to the testimony produced by the plaintiffs to show the general insanity of Hall at the time he executed the power in question. If he was then insane and his insanity was general, the instrument was a nullity, and no title could be transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded as the act of John Hall than if he was dead at the time of its execution.

It appears from the testimony produced by the plaintiffs that John Hall was a lieutenant in the United States navy, and at one time had the command of a vessel-of-war; that he was, in 1848, on this coast; that whilst here the alcalde grant was issued to him; that in 1849 he became unwell, and his health was so much affected that he was sent to the eastern states under the

charge of a physician; that he arrived in New York and joined his family in June, 1849; that he remained with his family until June, 1851 — two years; that during this period there were such indications of insanity that upon the advice of his consulting and family physician he was sent to the asylum at Frankford; that he remained there, under treatment for insanity, until January 25, 1854, when he was removed to the state insane asylum; and that he died an inmate of this latter institution in September, 1860.

The witnesses produced by the plaintiffs are either the physicians attending or persons immediately surrounding Hall both before his entry into the asylum and afterward. The testimony discloses the possession by him of hallucinations and illusions on many subjects. Mr. Wright states that whilst in New Jersey, after his return, he was at times greatly incensed at his neighbors, asserting that they had destroyed his garden, which they had not, and complained of noises in his ears, which he said arose from a train of cars running through his head.

Miss Harris testified that he was subject to fits of abstraction, had strange fancies, thought he had been to heaven, and said so, and finding his wife was not there had returned; that he complained much of confusion in his head, and thought trains of cars were running through it; and would object to a light in the evening as being painful to his head and setting it on fire; that he would work in his garden sometimes for a whole day without food, giving as an excuse that he was obliged to do so for his living; that he would plant vegetables and flowers and soon dig them up and then charge his neighbors with killing his plants; that he would get excited and threaten to shoot any one who came on his place; that there was a spring of water in the cellar which was drained through a vacant lot, and that he at one time took a fancy to fill up the drain, and then when the water rose he spent hours in trying to bail it out. He did this repeatedly. He would fill up the drain in the daytime and his wife would hire a man to open it after night. When remonstrated with for his conduct, he said it was God's will it should be done. He would sometimes fancy himself the Creator, and want parties to address him as such; at other times he would use the most blasphemous language. He would buy the most unnecessary things, posts and rails, for which he had no use. He took great dislike to certain persons, and would not permit them to come to the house. He would sometimes sit at the table with a vacant stare, and neither eat himself nor help others. He took no notice of his children and no care of his family, and before that he was a devoted husband and affectionate to his children. At times he would treat visitors very insolently, fancying they came to injure him. He would expose himself all day to the hot sun, and if called in he would say he was too busy and obliged to work. He fancied he owned everything he saw at the stores, and could not understand why he could not help himself to what he liked. After Hall was sent to the asylum, it appears that he continued subject to hallucinations. Wright testifies that it was impossible to hold any connected conversation with him, or to keep his mind centered on any one subject; that he fancied his fellow-patients were distinguished historical characters, and desired to introduce them to the witness. He had scars upon his wrists and arms, and said he had been tattooing himself, a beautiful art he had acquired at the Sandwich Islands, and desired to tattoo the witness, stating that the operation was perfectly painless. Miss Harris states that when she visited him at the asylum

he imagined he was employed to fit out a fleet, and said he was oppressed with care; he was so occupied with his business.

Wistar, the steward at Frankford asylum from May, 1852, to September, 1853, testifies that Hall had a great many singular propensities. When awake he spent a great deal of his time in indistinct mutterings and murmurings. He had a propensity for weaving wire and fish bones into his arms and legs, through the flesh and under the skin, very much as a woman would darn a stocking. This resulted in sores, which festered and discharged. He was in the habit of heaping up his bed-clothes in his bed daily in the form of a haystack or pyramid, and would then cap the same with the chamber utensil, whether it contained anything or not. He had a fancy of putting on his clothing in a way not designed to be worn. He tore his clothing and bedding. He was very profane and obscene in his language, and spent a good deal of time in what he termed prayer, which in a sane man would have been blasphemy of the worst kind. The testimony of Mrs. Wistar is to the same effect.

Dr. Fithian, the family physician of Hall from June, 1849, until he went to the hospital, pronounces his malady insanity and says that it was accompanied with unnatural excitement, restlessness, irritability — that he was incoherent, and had want of connection of thought and expression. He adds that the disease was acute mania, rather than dementia, into which acute mania is apt to run.

Dr. Evans, who was one of the physicians of Hall, both before and after he was at the asylum, states as his recollection of the disease that he was laboring under chronic inflammation of the meninges of the brain, producing mania, and resulting in dementia, and that whilst at the asylum he gradually deteriorated and grew worse, and that he (the doctor) considered him hopelessly insane.

Dr. Worthington, the medical superintendent, pronounces the disease of Hall mania, with a tendency to dementia, and states that he had various delusions, and among others believed he was the Son of God.

I have stated the most important matters testified to by the witnesses, from which you must draw your conclusions as to the sanity or insanity of Hall at the time the power was executed. I do not refer to the testimony as to Hall's condition after his removal from the asylum at Frankford to the state asylum. It is not pretended that after that period he was possessed of lucid intervals; but, on the contrary, he gradually sank from one degree of weakness to another until his death. You will perceive that the physicians of Hall state that the malady of which he was suffering was originally acute mania, and that it ended in dementia. You will observe that he was affected by similar hallucinations and illusions, both before and after he went to the asylum; and you will remember, as already stated, in speaking of mania, that it is characterized by hallucinations or delusions — the patient believing and acting upon the supposed reality of facts and events which have never occurred or do not exist. The testimony of all the witnesses is that the malady from the commencement continually increased, the patient gradually sinking from one degree of enfeeblement to another. Now, there may have been lucid intervals with the patient, arising from an intermission in the operation of the disease. Whether there was any such intermission and consequent lucid interval in this case is for you to determine. In considering this matter, you will remember that the malady in this case arose from a disease of the lining membrane of

the brain, from what Dr. Evans designates chronic inflammation of the meninges of the brain; that it had continued with more or less intensity for over three years when the power of attorney was executed. If, therefore, you should come to the conclusion that he was, as asserted by his physicians, insane before he entered the asylum, and that his malady continued to grow worse afterward, you will be justified in finding that it had attained that character which the books designate as habitual insanity, which is continued and settled derangement. If you come to this conclusion you will then look for proof of his having had a lucid interval when he executed the power. The burden of proof, in that event, that is to say, if habitual insanity be established, lies upon the party who alleges that a lucid interval existed.

Several very able physicians in this city have been called to state their opinions, founded upon the evidence of the plaintiffs, that of Brodhead being excluded, as to the probability of lucid intervals in the condition in which Hall is shown to have been. They all express the opinion that such lucid intervals were probable; indeed, their testimony goes so far as to state that in their judgment his insanity was not, previous to 1853, of that severe and general character as to render him at all times incapable of transacting business on some subjects.

§ 19. *Opinions of physicians on the subject of insanity.*

I will only observe that the opinions of physicians are received in evidence from their superior knowledge of matters connected with their profession. It would be difficult to present in an intelligible way to a jury all the grounds upon which learned professional men may base their judgments. The law, therefore, allows their judgment to be received; but at the same time, where professional men are of equal standing and intelligence, it awards much higher consideration to those opinions which are based upon personal observation and examination of the patient.

The case, gentlemen, is one of great interest, and is of much importance to the parties. It has been tried with great ability by counsel, and I doubt not that after the patient consideration which you have given to their arguments and to the evidence you will, under the instructions of the court, readily reach a wise and just verdict. (Verdict and judgment for plaintiffs.)

The case was now taken to the supreme court, where the judgment was affirmed. *DEXTER v. HALL*, 15 Wallace, 9-28. 1872.

Opinion by MR. JUSTICE STRONG.

The prominent question in this case is, whether a power of attorney executed by a lunatic is void or whether it is only voidable. The circuit court instructed the jury that a lunatic, or insane person, being of unsound mind, was incapable of executing a contract, deed, power of attorney, or other instrument requiring volition and understanding, and that a power of attorney executed by an insane person, or one of unsound mind, was absolutely void. To this instruction the defendant below excepted, and he has now assigned it for error.

§ 20. *A power of attorney executed by an insane person, or one of unsound mind, is absolutely void.*

Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The funda-

mental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has mind, but it is immature, insufficient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract for want of mental capacity, he has no protection if his contract is only voidable.

§ 21. — *authorities reviewed.*

It must be admitted, however, that there are decisions which have treated deeds and conveyances of idiots and lunatics as merely voidable and not void. In *Beverly's Case*, 4 Reports, 123*b*, which was a bill for relief against a bond made by Snow, a lunatic, it was resolved that every deed, feoffment or grant which any man *non compos mentis* makes is avoidable, and yet shall not be avoided by himself, because it is a maxim of law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself and disable his own person. A second reason given for the rule was, "because when he recovers his memory he cannot know what he did when he was *non compos mentis*." Neither of these reasons is now accepted, and the maxim no longer exists. There were other things ruled in *Beverly's Case*, among which were these: that the disability of a lunatic is personal, extending only to the party himself, except that it extends to privies in tenure, as lord by escheat, and privies in estate, as tenant in tail; but that privies in blood, as heirs, or privies in representation, as executors or administrators, might show the disability of the ancestor, or testator, or intestate. It was also resolved that acts done in a court of record were not avoidable even in equity. Lord Coke, in commenting on the case, remarked that "as to others there is a great difference between an estate made in person and by attorney; for if an idiot or *non compos mentis* makes a feoffment in fee in person, and dies, his heir within age, he shall not be in ward, or if he dies without heir the land shall not escheat; . . . but if the feoffment is made by letter of attorney, although the feoffor shall never avoid it, yet after his death, as to all others in judgment of law, the estate is void, and therefore in such case, if his heir is within age, he shall be in ward; or, if he dies without heir, the land shall escheat." Such also is the rule as stated in *Fitz Herbert's Natura Brevium*, 202*c*. This is



plainly a recognition of the principle that the letter of attorney of an idiot or lunatic is void, though he may not be permitted himself to assert its nullity. His heir and all others may. The doctrine is also asserted that as against the heirs of a lunatic his deed is invalid, and this, we think, has been steadily maintained in England.

In *Thompson v. Leach*, reported in *Carthew*, p. 435, and in *Comberbach*, p. 469, a clear distinction was taken between the feoffment of a lunatic taking effect by livery of seizin, and his deed of bargain and sale, his surrender or grant. The former was held to be voidable only because of the solemnity of the livery, while the latter were held to be void. The case was ejectment brought by a lunatic's heirs, and the controlling question was whether his deed was only voidable or whether it was absolutely void. The grantor had a life estate upon which were dependent contingent remainders, and he made a deed of surrender. If his deed was at any time effective before the contingency happened, it merged the tenancy for life and destroyed the contingent remainders, and though the deed might afterwards be avoided by any means in law, yet the contingent remainders, being once extinct, could not be revived by any matter *ex post facto*. It was necessary, therefore, to determine whether the deed was a nullity or whether it was good until avoided. The court resolved that the deed was void *ab initio*, because of the grantor's lunacy. It was said that "there is a difference between a feoffment and livery made *propriis manibus* of an infant, and the bare execution of a deed by sealing and delivery thereof, as in cases of grants, surrenders, releases, etc., which have their strength only by executing them, and in which the formality of livery of seizin is not so much regarded in the law, and, therefore, the feoffment is not void, but voidable; but surrenders, grants, etc., of an idiot are void *ab initio*." The case is a leading one, and it is in some respects more fully reported in *Salkeld* (vol. 3, p. 300; see, also, 2 *Ventr's*, 198). There it appears not only that the distinction mentioned is recognized, but that *Holt*, C. J., declared the deed of a person *non compos mentis* to be void; that if he grants a rent, and the grantee distrains for arrears, he may bring trespass; that his letter of attorney, or his bond, are void because, as he stated, the law had appointed no act to be done for avoiding them. *Thompson v. Leach* has never been disturbed, and, so far as we know, has never been doubted. It was followed by the case of *Yates v. Boen*, in *Strange* (vol. 2, p. 1104), which was an action of debt upon articles. The defendant pleaded "*non est factum*," and offered to give lunacy in evidence. Upon the authority of *Thompson v. Leach*, and *Smith v. Carr*, decided in 1828, the evidence was received.

The doctrine of *Thompson v. Leach* was asserted also in *Ball v. Mannin*, 1 *Dow & Clark*, 380, decided in the house of lords in 1829. In that case the sole question presented was, by agreement of counsel, whether the deed of a person *non compos mentis* was *invalid at law*. In the inferior court the judge had charged the jury that "to constitute such unsoundness of mind as should avoid a deed *at law*, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life," and refused to charge that the unsoundness of mind must amount to idiocy. The ruling was sustained by the court of king's bench in Ireland, and, on writ of error, by the exchequer chamber. The case was then removed to the house of lords, and the judgment was affirmed. It is, therefore, the settled law of England, and it has been since the decision in *Thompson v. Leach*, that while the feoffment of an idiot or lunatic is only voidable, his deed, and especially his power of attorney,

are wholly void. And now by act of parliament, 7th and 8th Victoria, chapter 76, section 7, his conveyance by feoffment, or other assurance, is placed on the same footing with his release or grant.

Sir William Blackstone, it is true, appears to have overlooked the distinction made in *Thompson v. Leach*; and in his Commentaries (book 2, p. 291), while admitting that the law was otherwise prior to the reign of Henry VI., asserted the doctrine that the conveyances of idiots and persons of non sane memory, as well as of infants and persons under duress, are voidable, but not actually void. But Sir Edward Sugden (1 Sugden on Powers, 179; see, also, Shelford on Lunatics, 257-59) notices this statement with disapproval. His remarks are as follows: "When *Beverly's Case* was decided, it was holden that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice Blackstone, following the old rule, has laid down that deeds of lunatics are avoidable only, and not actually void. But in *Thompson v. Leach* the distinction was solemnly established that a feoffment with livery of seizin of a lunatic, because of the solemnity of the livery, was voidable only; but that a bargain and sale, or surrender, etc., was actually void. This, therefore, was the ground of the decision in *Yates v. Boen*. When the chief justice remembered that an innocent conveyance, or a deed, by a lunatic, was merely void, he instantly said that *non est factum* might be pleaded to it and the special matter be given in evidence."

In this country there has been inconsistency of decision. Some courts have followed Mr. Justice Blackstone, and *Beverly's Case*, without noticing the distinction made in *Leach v. Thompson*, *Yates v. Boen*, and other English cases. Such are the decisions cited from New York, beginning with *Jackson v. Gu-maer*, 2 Cowen, 552, and those relied upon made in other states. Nowhere, however, is it held that the power of attorney of a lunatic, or any deed of his which delegates authority but conveys no interest, is not wholly void. And in Pennsylvania, in the *Estate of Sarah De Silver*, 5 Rawle, 111, it was directly ruled that a lunatic's deed of bargain and sale is absolutely null and void, and the distinction between his feoffment and his deed was recognized. So, also, in *Rogers v. Walker*, 6 Penn. St., 371, which was an ejectment by a lunatic, it was held that a purchaser from her had no equity to be reimbursed his purchase money, or the cost of improvements, and Chief Justice Gibson said: "Since the time of *Thompson v. Leach*, Carthew, 435, it has been held that a lunatic's conveyance executed by sealing and delivery only is absolutely void as to third parties, and why not void as to the grantor? It was said to be so for the very unphilosophical reason that the law does not allow him to stultify himself,—an early absurdity of the common law, which was exploded with us by *Bensell v. Chancellor*, 5 Whart., 371."

The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. But as already remarked, a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degree. With a lunatic it is wanting altogether. Yet it is universally held, as laid down by Lord Mansfield in *Zouch v. Parsons*, 3 Burrow, 1805, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. We are not aware that any different rule exists in England or in this country. It has repeatedly been determined

that a power of attorney made by an infant is void. *Saunderson v. Marr*, 1 H. Bl., 75; 2 Lilly, Abridgment, 69; 1 Am. Lead. Cas., 248-9. So it has been decided in Ohio (*Lawrence v. McArter*, 10 Ohio, 37), in Kentucky (*Pyle v. Cravens*, 4 Litt., 17), in Massachusetts (*Whitney v. Dutch*, 14 Mass., 462), and in New York (*Fonda v. Van Horne*, 15 Wend., 636). In fact we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.

It must, therefore, be concluded that the circuit court was not in error in instructing the jury that a power of attorney executed by an insane person, or one of unsound mind, is absolutely void.

§ 22. *Testimony of experts on the subject of insanity.*

This disposes of the only serious question in the case. There are other assignments of error, but they may be dismissed with brief notice. The only one which has any plausibility, and which needs particular notice, is that which complains of the refusal of the court to permit a medical witness to give his opinion respecting the sanity of John Hall at the time when he signed the power of attorney, basing his opinion upon the facts and symptoms stated in the depositions read at the trial. The witness was, however, allowed to give his opinion upon the testimony adduced by the plaintiffs. The record does not show fully what were the facts stated in the depositions, nor whether they were established by uncontradicted evidence. It may be, therefore, that by the form in which the question was put, the witness was required not merely to give his opinion upon facts, but to ascertain and determine what the facts were. This of course was inadmissible. The rule is, as laid down in *Greenleaf's Evidence*, § 440: "If the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence what is his opinion upon the case on trial; though he may be asked his opinion upon a similar case hypothetically stated." *Sills v. Brown*, 9 Carr. & P., 601. The question asked was: "From the facts stated in these depositions, and the symptoms stated, what, in your opinion, was the state of John Hall's mind on December 27, 1852, as to sanity or insanity?" It was to this the plaintiffs objected. But the witness gave his opinion, founded on all the testimony adduced by the plaintiffs tending to show insanity, and that opinion was that Hall was capable of doing business and of executing a power of attorney. He could have said no more had he been allowed to consider the evidence given by the defendants as well as that given by the plaintiffs. The defendants, therefore, received no possible injury from the ruling of the court. Hence this assignment cannot be sustained.

[Here the court considered the question of adverse possession under the California statutes.]

There is nothing more in the case that requires particular notice; nothing which would justify our awarding a new trial.

*Judgment affirmed.*

HOGG v. FISHER.

(Circuit Court for Pennsylvania: Peters, C. C., 163-165. 1815.)

STATEMENT OF FACTS.—Ejectment for lands conveyed to plaintiff by his father, David Hogg. Defendants claimed as the heirs of David Hogg, and contested the validity of the deed on the ground of the mental incapacity of the grantor.

§ 23. *The presumption of law is in favor of mental capacity, and the burden of proof is on the party alleging incapacity to contract.*

Charge by WASHINGTON, J.

The point on which the cause turns, and which it is incumbent upon the defendants to prove to the satisfaction of the jury, is, that on the 12th of March, 1804, when the disputed deed was made, the grantor was not of sound mind and of disposing memory; that is, that he was deficient in those qualities of the mind which could enable him to dispose of his property with understanding and reason. The presumption is always in favor of mental capacity; and he who alleges the contrary, for the purpose of invalidating a deed or will, must prove it.

§ 24. — *if the party has at any prior time been mentally incapable of contracting, the burden of proof is shifted to the party who alleges his sanity.*

But if a state of general derangement, or imbecility of mind, be proved at any time prior to the act which is attempted to be invalidated, the burthen of proof is shifted; and the person affirming the validity of the conveyance must prove the mental capacity of the grantor or devisor to do the act at the time it was executed. It is not sufficient for him to show that the grantor or devisor could return appropriate answers to plain or common questions; but he must prove that he was of sound mind and disposing memory.

If no actual derangement or mental imbecility be proved, it is not sufficient *per se* to assign a cause of derangement which might or might not have produced that effect. Paralysis, for instance, is sometimes a cause of mental derangement, and frequently it is not. If attended by apoplexy, or an affection of the nerves, it necessarily affects the mind; but it frequently affects only the muscles, thereby producing bodily infirmity alone, and leaving the mind unimpaired. If the patient survives the stroke for any considerable length of time, it may in general be concluded that it was simply a paralysis, affecting the body only. It is in this way that I understand the learned physician who was examined to this particular point.

Whether the grantor in this case was affected in one way or the other may well be doubted. If the physician who saw him, and who has given testimony respecting his situation, had had an opportunity to examine his case, and to form a deliberate opinion upon it, that opinion, pronounced by a man of his acknowledged professional talents, would have been almost conclusive upon this point. But he saw him once only, and then for a very short time; there was little or no conversation between them; and this witness gave it as his opinion that he was incapable of conversing.

The jury must resort to the evidence given to them on both sides, to prove the real state of the grantor's mind, at, before and after the time when this deed was made; and in deciding this important fact, they will take into view the state of his mind, whether, as it may have been affected by the paralytic stroke, or by old age, or by any undue influence exercised over him by his son Jonathan, or by all these causes combined. In weighing the contradictory evidence upon which they have to decide, that which contains facts upon which they may judge for themselves, and are given by witnesses who, by frequently seeing and conversing with the grantor, had a full opportunity of forming a judgment as to his state of mind, ought to prevail with the jury over general opinions upon the same subject, formed by persons who had fewer opportunities of judging. (Verdict for plaintiff.)

## MOHR v. MANIERRE.

(11 Otto, 417-426. 1879.)

ERROR to U. S. Circuit Court, Eastern District of Wisconsin.

Opinion by MR. JUSTICE FIELD.

**STATEMENT OF FACTS.**—This was an action for the possession of certain land in the county of Walworth, in the state of Wisconsin. It was commenced in one of the state courts, and on the application of the plaintiff was removed to the circuit court of the United States. It was there tried by the court, without the intervention of a jury, upon stipulation of the parties. The court was held by the circuit and district judges, and, as they were opposed in opinion, the case is brought here upon a certificate of the points upon which they differed.

The facts out of which this division arose are briefly these: The plaintiff **Mohr**, previously to the sale under which the defendant claims, was the owner of the premises in controversy. In 1869 he was, by legal proceedings in the county court of Walworth, adjudged to be a lunatic incapable of taking care of himself and managing his property, and a guardian was appointed over him. In October, 1870, the guardian applied, by petition to the court, for license to sell the real estate of his ward for the purpose of paying his debts. The petition alleged that the goods, chattels, rights and credits of the lunatic in the hands of the guardian were inefficient to pay such debts and the charges of managing his estate. It set forth the amount of the debts and charges, the extent to which they exceeded the personal estate of the lunatic, and his opinion as to the necessity of using the whole or the greater part of the estate to pay the indebtedness, accompanied by a certificate of the supervisors of the town to the same effect, and it gave a description of the real property. Upon being filed, an order was made by the court requiring the next of kin of the lunatic, and all persons interested in his estate, to appear before the court on a day named, and show cause why a license should not be granted for the sale of the estate as prayed, and that notice be given by publication in a newspaper for four successive weeks prior to the day of hearing, and also by service upon certain persons named.

On the day appointed, January 2, 1871, there being no appearance adverse to the application, and no objection interposed, the court made an order granting a license to the guardian to sell the lands. The order recited that pursuant to the order made on the 21st of November, 1870, the petition was heard and considered; that the affidavits of two persons, who were named, were filed, showing that the notice required had been duly published; that it appeared, after full examination, that it was necessary, in order to pay the debts of the lunatic, that all his real estate should be sold; and that the supervisors of the town had certified to the judge of the court their approbation of the proposed sale, and that they deemed it necessary. The order required the guardian, before the sale, to execute to the judge a bond in the sum of \$15,000, conditioned that he would sell the property and account for and dispose of the proceeds in the manner provided by law; also, that he would take the oath required by statute; give notice, of the terms and place of the sale, with a proper description of the property, by posting in three public places in the town where the property was situated, and by publication for three weeks in a weekly newspaper. It contained other directions not material to be mentioned, which were designed to secure a fair sale and a just price for the property; and it required

the guardian to report his proceedings to the court. Under this license a sale was made, and a deed executed to the purchaser, and a report thereof made to the court, which was confirmed. The defendant claims under the purchase at this sale.

Subsequently the proceedings and commission in lunacy were superseded, and the plaintiff Mohr brought the present action to recover possession of the premises. After it was commenced a party to whom he had transferred an undivided interest was joined with him as co-plaintiff.

The case turns upon the validity of the sale in question. The order of the county court of Wisconsin in granting the guardian license to sell the property was assailed as having been made before notice of the time and place of hearing the petition of the guardian had been published for four successive weeks, as required by the court and the statute of the state. It is insisted that such notice was in the nature of process to bring the parties before the court, and its constructive service by publication for the period mentioned was essential to give the court jurisdiction. The order recited, as already stated, that by the affidavit of two persons named, the required publication was shown to have been made; but the judges certify that it appeared from one of the affidavits that the notice was not thus published. It is to be regretted that the two affidavits are not embodied in the record. We might differ from the judges in the conclusion reached by them. We might, perhaps, find that a publication was made once a week in four successive weeks, and hold that this was a sufficient compliance with the statute. Between the 21st of November, 1870, when the order for publication was made, and the 2d of January, 1871, when the petition was heard, more than four weeks had elapsed.

We shall assume, however, that the notice was not published for the full period prescribed, and the question for consideration is whether such omission, all other requisites of the statute having been complied with, rendered the order of the court invalid *as against the plaintiff Mohr*, (a) the then lunatic; or, in other words, whether such publication was essential to the jurisdiction of the court to grant the license to sell. The supreme court of the state, in a case brought by this plaintiff,—*Mohr v. Tulip*,—which came before it in 1876, affecting a part of the premises sold at the same guardian's sale, upon substantially the same proofs here presented, held that the sale was invalid for want of sufficient publication of such notice. On the other hand, the supreme court of the United States, in considering the validity of a sale of a decedent's estate under a statute in force in what was then the territory of Wisconsin, requiring the county court, before passing upon the application for a license to sell, to order notice of its hearing to be given to all parties interested who did not signify their assent to the sale, had held, as far back as 1844, after deliberate consideration, that the absence of such notice from the record, or the fact that no such notice was given, did not affect the jurisdiction of the court, but was merely a matter of error, to be corrected by an appellate tribunal; and this decision has been repeatedly recognized as correctly marking the distinction between matters of error and matters of jurisdiction in proceedings for the sale of such estates. *Grignon v. Astor*, 2 How., 319 (Courts, §§ 496–500).

Under these circumstances the circuit and the district judge differed in opinion upon the following questions: 1st. Whether the county court had jurisdiction

(a) The record says, as against the defendant, which is the same thing, for no one disputes his title but the plaintiff.

to make the order granting the license to sell; or whether the order was invalid by reason of the alleged defect in the publication of notice; and 2d. Whether, in view of the decision of the supreme court of the United States and the decision of the state supreme court in *Mohr v. Tulip*, the circuit court should follow the latter decision and hold the sale invalid.

The framers of the constitution, in establishing the federal judiciary, assumed that it would be governed in the administration of justice by those settled principles then in force in the several states, and prevailing in the jurisprudence of the country from which our institutions were principally derived. Among them none were more important than those determining the manner in which the jurisdiction of the courts could be acquired. This necessarily depended upon the nature of the subject upon which the judicial power was called to act. If it was invoked against the person, to enforce a liability, the personal citation of the defendant or his voluntary appearance was required. If it was called into exercise with reference to real property by proceeding *in rem*, or of that nature, a different mode of procedure was usually necessary, such as a seizure of the property, with notice, by publication or otherwise, to parties having interests which might be affected. The rules governing this matter in these and other cases were a part of the general law of the land, established in our jurisprudence for the protection of rights of persons and property against oppression and spoliation. And when the courts of the United States were invested with jurisdiction over controversies between citizens of different states, it was expected that these rules would be applied for the security and protection of the non-resident citizen. The constitutional provision owed its existence to the impression that state prejudices and attachments might sometimes affect injuriously the regular administration of justice in the state courts. And the law of congress which was passed to give effect to the provision made it optional with the non-resident citizen to require a suit against him, when commenced in a state court, to be transferred to a federal court. This power of removal would be of little value, and the constitutional provision would be practically defeated, if the ordinary rules established by the general law for acquiring jurisdiction in such cases could be thwarted by state legislation or the decision of the local courts. In some instances the states have provided for personal judgments against non-residents without personal citation, upon a mere constructive service of process by publication; but the federal courts have not hesitated to hold such judgments invalid. *Pennoyer v. Neff*, 96 U. S., 744. So, on the other hand, if the local courts should hold that certain conditions must be performed before jurisdiction is obtained, and thus defeat rights of non-resident citizens acquired when a different ruling prevailed, the federal courts would be delinquent in duty if they followed the later decision.

If these views be applied to the present case there will be little difficulty in answering the questions which appear to have embarrassed the judges below. The statute of Wisconsin provides for the sale of the real estate of a lunatic to pay his debts when his personal property is insufficient for that purpose, and points out the steps which his guardian must take to obtain a license to make the sale. It is admitted that these steps were taken for the sale in question, except that the order of the county court to show cause why the license to sell should not be granted, issued upon filing the petition, was not published for four successive weeks before the petition was heard and the license granted. The statute on this subject says, in its fourth section, that "every such order

to show cause shall be published at least four successive weeks in such newspaper as the court shall order, and a copy thereof shall be served personally on all persons interested in the estate and residing in the county in which such application is made, at least fourteen days before the day therein appointed for showing cause; *provided, however, if all persons interested in the estate shall signify in writing their assent to such — sale*, the notice may be dispensed with." And the sixth section provides that "the judge of the county court, at the time and place appointed in said order, or at such other time as the hearing shall be adjourned to, *upon proof of the due service or publication of a copy of the order, or upon filing the consent in writing to such sale of all persons interested*, shall proceed to the hearing of such petition, and if such consent be not filed, shall hear and examine the allegations and proofs of the petitioner and of all persons interested in the estate who shall think proper to oppose the application."

§ 25. *The publication of notice of a sale by the guardian of a lunatic is only intended to protect parties holding adverse interests. It is not essential to the jurisdiction of the court.*

It is apparent from these sections that the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. It may be dispensed with if the parties having such interests consent to the sale. The consent could not be signed by the lunatic, for he, by his condition, would be incapable of giving a consent, and yet upon the others' consent, the court could proceed to act without notice to him.

Nor, indeed, was there any reason why publication of notice should be made for other parties than those who held adversary interests. The lunatic could not be affected by such publication any more than by his consent. The application of the guardian to the county court was required by the law only as a check against any improvident action by him. There was nothing in the nature of the proceedings which required a notice of any kind, so far as the rights of the lunatic were concerned. The law would have been free from objection had it simply authorized, upon the consent of the court, a sale of the lunatic's property for the payment of his debts. The authority of the court in that case, as in this, would have existed to license the sale whenever it appeared that the personal estate of the lunatic was insufficient to pay his debts, and that a sale of his real property was necessary for that purpose.

§ 26. *As against a lunatic no publication of notice of sale of his property under license is necessary.*

There is no charge of fraud in the action of the guardian, nor is it suggested that the property sold did not bring a fair price. The simple question is whether, as against the lunatic, the license to sell was invalid for insufficient publication of notice of the hearing, the same being, as already stated, required only for the protection of other parties interested in the estate. The decision of this court in *Grignon's Lessee v. Astor*, to which we have already referred, would seem to be decisive on this point. Indeed, it goes beyond what is required for the affirmance of the judgment here. That was a case of an administrator's sale under a statute in force in the territory of Wisconsin, which provided that the county court, previous to passing upon the presentation made by the petition of an executor, administrator or guardian for license to sell the property in his hands belonging to the deceased or his ward, should order due notice to be given to all parties concerned or their guardians, who did not



signify their assent to the sale, to show cause at such time and place as should be appointed why the license should not be granted. But in the order granting the license, it did not appear that notice had been given as thus required, and various other omissions were mentioned as impairing its validity. This court, however, held that no other requisites to the jurisdiction of the county court were prescribed by the statute than the death of the intestate, the insufficiency of his personal estate to pay his debts, and a representation of these facts to the county court where he dwelt or his real estate was situated; that the decision of the county court upon the facts was the exercise of the jurisdiction which the representation conferred; that any irregularities or errors in the decision were matters to be corrected by an appellate court; and that the decision could not be collaterally attacked by reason of them. The court observed, in substance, that it was not necessary that the record should disclose the contents of all the papers before the county court, or its action in preliminary matters; that it was sufficient to call its powers into exercise that the petition stated the facts upon the existence of which the law authorized the sale; that the granting of the license was an adjudication that such facts existed; and that a purchaser was not bound to look beyond the decree. The doctrine thus stated has ever since been adhered to by this court in like cases, and in 1865, in *Comstock v. Crawford*, which arose upon a similar statute in the same territory, that decision was followed. 3 Wall., 396 (Est. of Dec., §§ 55-58). Its maintenance was held to be essential to the security of numerous estates in Wisconsin, where it is said many defects are found in the records of the proceedings of the probate courts in the early period of her history. It was adopted for many years by her courts after she ceased to be a territory and became a state of the Union. It was well fitted for the repose of titles. Whether the reasoning of this court in other cases would not lead to some modification of its doctrine it is unnecessary to consider. As already intimated, there is no occasion to go to the full extent of the doctrine for the disposition of the present case. Here no parties claiming interests adverse to those of the lunatic are objecting to the license to sell, granted on his behalf and at his request through his guardian.

In *Mohr v. Tulip*, the supreme court of Wisconsin overlooked the distinction between the position of the lunatic, who was in fact the applicant through his representative, and that of parties having adversary interests in the property. He can no more object to the sale of his property for want of notice to them, if the provisions of law intended for his protection were followed, than a plaintiff in a personal action could object to a sale upon his own judgment on the ground that the latter was prematurely entered. The object of notice or citation in all legal proceedings is to afford to parties having separate or adverse interests an opportunity to be heard. It is not required for the protection of the applicant or suitor.

The statute declared that upon the existence of certain facts the sale of the lunatic's estate might be made, and when these appeared in the petition of the guardian, the court had jurisdiction to act, so far as his rights were concerned, as fully so as if the statute had so declared in terms, whatever may be the effect of its proceedings upon the interests of parties not properly brought before the court. We see no reason, therefore, so far as his interests are affected, to depart from the doctrine of *Grignon's Lessee v. Astor*.

*Judgment affirmed. (a)*

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(a) Affirming *Mohr v. Manierre*, \* 7 Biss., 419.

## UNITED STATES v. LANCASTER.

(Circuit Court for Illinois: 7 Bissell, 440-445. 1877.)

Charge by BLONGETT, J.

STATEMENT OF FACTS.—On the 14th of February last Alvin N. Lancaster was put upon his trial in this court, on an indictment for the crime of perjury. The trial resulted in a verdict of guilty, and a motion was made for a new trial. One of the grounds of this motion was based upon the suggestion that at the time of his trial the defendant was of unsound mind, and therefore unable to properly plead to the charge or conduct his defense. This suggestion was sustained by such affidavits and other proofs as, in my estimation, made it necessary to the ends of justice that the fact should be investigated by a jury. And you have been impaneled to inquire into and pass upon the question.

§ 27. *Upon a motion for new trial made by the defendant to a criminal charge, on the ground of insanity at the time of his trial, it must be proved that he was so far of unsound mind as to render him incapable of comprehending the nature of the charge against him and of properly presenting his defense.*

There is no controverted question of law in the case, and the inquiry involves only a question of fact, of which you are the proper and sole judges. The question is, was the prisoner, at the time of his trial, so far of unsound mind as to be incapable of comprehending the nature of the charge against him, and of properly presenting his defense? The testimony is material to be considered only so far as it tends to throw light on this question, and naturally divides itself into two classes:

1. The testimony of witnesses who have known the prisoner for a longer or shorter time, and have detailed facts in regard to his history, his business enterprises, and his domestic and financial troubles. 2. The testimony of professional men who have given special attention to the investigation of mental and nervous diseases, and who, by reason of their skill and attainments, are deemed in law qualified to give an opinion as experts, or persons of skill upon the question before you.

You have heard from the various witnesses who have known the defendant, some of them for many years, many facts in regard to his previous life; his business, his temperament, and various vicissitudes and incidents in his career; his successes and failures, and the alleged changes which, it is claimed, have taken place in him, and from which you are asked to infer that he has become insane. There are no special contradictions or discrepancies in this testimony. The witnesses who have been called on both sides agree in many of the substantial matters of fact.

It may be considered as conceded that defendant now is about fifty years of age; that for many years previous to 1873 he had been an extensive and successful operator in real estate, and had accumulated a large amount of property, his property being estimated as worth, in 1873, over and above incumbrances, from \$150,000 to \$250,000; that he possessed unusual capacity as a business man — was prompt and rapid in his conduct of negotiations and business affairs, and always exhibited a quick and irascible temper and a somewhat imperious, jealous and exacting disposition; that in 1869 he lost his wife, and in 1870 his children died, and he showed immediately after this bereavement great grief, and had a very demonstrative way of displaying it.

Sometime in the summer of 1873 a Miss Warren, of New York city, brought

some suits against him, for the collection of about \$12,000, which she claimed he owed her. He resisted this claim, and insisted that it was prosecuted for the purposes of blackmail, and charged all persons who took part in its prosecution as conspiring against him. And it seems to have become an almost fixed habit to indulge in violent denunciations of, and threats toward, all who had any part in the prosecution of these suits. His property has melted away, and he is now impoverished, and instead of being wealthy is really a poor man. These facts are admitted, or at least not disputed.

Other facts which may be said to be proved but are not admitted: that his mind is engrossed in trifles; he has become indifferent to business; has acted in a strange and unusual manner; become eccentric in his conduct; and although indicted for a grave crime, did not appear to realize his danger, and made no preparation for his defense, although often urged to do so by his friends. Eminent medical men, from examinations and from knowledge of the man, give an opinion, as a matter of skill, that he is insane. From all this group of facts, you are asked to deduce the conclusion that the prisoner was, at the time of trial, insane, the theory being, that the proof shows that since the death of his children his mind has been giving away, until he is now, and was at the time of his trial, actually insane, or so far in the incipient stages of insanity as to render him incapable of properly appreciating and meeting the peril in which he was placed.

On the part of the government it is contended, and supported by the evidence of eminent medical men, that while they do not deny many of the facts testified to, they deny that they necessarily or fairly establish the allegation of insanity, but insist that all the incidents and facts stated in the testimony, only show him to be a man of violent passions, who has given way in latter years to a sort of ungovernable rage toward those who were endeavoring to enforce the collection of a valid debt from him; that he was always quick tempered and jealous, and has only exhibited to an aggravated degree his natural character toward those whom he disliked, and is simulating or putting on the appearance of insanity to avoid sentence.

The real question, as I have before said, is whether the evidence satisfies you that this man's mind had so far broken down and lost its texture that he was at the time of his trial incapable of comprehending the dangerous predicament in which he was placed, and taking intelligent measures to meet it? Did he realize the gravity of the offense with which he was charged, as he would if in the possession of his ordinary mental faculties? Not that he should have been so much affected by it as some other men would if he had been in possession of his ordinary mental vigor and coherence of ideas.

All the evidence tends to show that he was at one time, and not many years ago, a man of clear mental preceptions, understood the ordinary obligations which one man owes to another and to society, and while he may have been shrewd and sharp at a bargain, and perhaps exacting in enforcing what he deemed a legal or business advantage over those with whom he was dealing, yet there is no proof but that he recognized the ordinary moral and legal obligations of business, and was as truthful and upright as ordinary men in their dealings. And I think it may be considered as proven, that in the last two or three years, since the loss of his children, to some extent, and since the commencement of his troubles with Miss Warren in a more palpable degree, his most intimate friends have noticed a marked change in his manner, conduct and habits of thought.

Does the proof satisfy you that the change in the man shows that he has become insane, or so far insane as to be incapable of properly caring for himself? And a single act of eccentricity or of irrational conduct is not evidence of insanity, but a group or series of unnatural acts may properly be considered as tending to prove insanity. Or were these acts the result of his giving way to a naturally violent temper and jealous disposition? Were these exhibitions the result of insanity, or mere neglect to properly rule his own spirit? Has he simulated insanity, or was he in fact insane at the time of his trial. The name of the disease is not important if the man is really crazy. It makes no difference whether it is called paralysis of the insane, or paresis — or by some other name — if the fact of insanity exists. Doctors may disagree as to a diagnosis of disease, but we have nothing to do with mere names.

§ 28. *Burden of proof of insanity rests upon the defendant, though he is entitled to the benefit of any reasonable doubt.*

While the burden of proof may be said to be on the defendant, to satisfy you that he is in fact insane, yet, if the proof, when all considered together, leaves a reasonable doubt upon your mind of this man's sanity, he should have the benefit of the doubt. That is to say, no man should be considered as a proper subject for criminal prosecution, of whose sanity there is ground for a reasonable doubt. The question is not as stated by counsel for the prisoner, whether the defendant has had a fair trial, but whether he was in such a mental condition as to be capable of appreciating the exigence and properly preparing for it. If he was sane, he ought to have made proper preparations for his trial. If he was so insane as not to comprehend the peril he was in, or the crime he was charged to have committed, then he ought not to have been tried, and if he is still so insane, he ought not to be sentenced for the crime of which he has been found guilty by the jury.

This case should be considered in the same light by you as if it had not been tried. Suppose his trial was now impending, and his counsel should come into court and suggest that his client was so far insane as that he ought not to be tried, and the court, as a preliminary step, had ordered a jury to be impaneled to try the question of his sanity or insanity, the duty of that jury would be precisely what yours is now — that is, to inquire into and find whether the defendant was so far insane as to be incapable of realizing the perils in which he was placed, and taking such steps as a prudent man, under the circumstances, would have taken to prepare for his trial, and whether that insane condition still continues. If found insane by your verdict, the verdict now standing against him will be set aside. (Verdict for the accused.)

§ 29. *Presumptions.*—Every person of the age of discretion is presumed to be of sane memory until the contrary is proved. *United States v. Lawrence*, \*4 Cr. C. C., 518; *United States v. McGlue*, 1 Curt., 1; *Moore v. Connecticut Mut. Life Ins. Co.*, 1 Flip., 363; *Waters v. Connecticut Mut. Life Ins. Co.*, 2 Flip., 892.

§ 30. The law does not presume that insanity arose from any particular cause, and if the government asserts that the prisoner is guilty in law, because the insanity arose from drunken frenzy, this allegation must be proved as a necessary element in the charge. *United States v. McGlue*, 1 Curt., 1.

§ 31. *Opinions of witnesses not experts* are competent evidence in cases where the object is to prove capacity or incapacity to make a contract, when the facts or circumstances are disclosed on which they found their opinions. *Kilgore v. Cross*, 1 McC., 144.

§ 32. *Evidence of acts, conduct and declarations*, both before and after the time of committing the crime, are admissible as tending to show an insane state of mind on the part of the defendant at the time of the commission of the crime, and upon the production of such evidence the prosecution may offer evidence of other acts, conduct and declarations of the ac-

cused, within the same period, to show that he was sane and to rebut the evidence introduced by the defense. Nor is it necessary, in order to offer the proof of such other acts, conduct and declarations as rebutting testimony, that the prosecution show that the accused was of sound mind and memory at the time to which they refer. The defense being insanity, the evidence of such acts, conduct, etc., is not an attack upon the prisoner's character, but rebutting testimony as to the sanity of the accused. *United States v. Holmes*, 1 Cliff., 98.

§ 33. *Insanity defined.*—A person is insane when he is not capable of understanding (1) that a design is unlawful or that an act is morally wrong; or (2) understanding this, when he is unable to control his conduct in the light of such knowledge. *Waters v. Connecticut Mut. Life Ins. Co.*, 2 Fed. R., 892.

§ 34. *Deed by guardian.*—Where a tenant in common is a *non compos*, a deed of partition executed by his guardian is good to pass the title of the ward, at least until it is avoided by the *non compos* or those claiming in privity of estate under him. *Thomas v. Hatch*, 8 Sumn., 170.

§ 35. *Capacity to make a will.*—Sufficient mental capacity to make a will consists of an understanding of the nature of the business in which he is engaged; of a recollection on the part of the testator of the property he means to dispose of; of the persons who are the objects of his bounty, and the manner in which it is to be distributed among them. His capacity may be perfect to dispose of his property by will and yet very inadequate to its management. The soundness of the testator's mind is to be judged of from his conversation and actions at the time the will was made. *Harrison v. Rowan*, 3 Wash., 580.

§ 36. *Declarations of a party to a will, whether prior or subsequent to its execution, are nothing more than hearsay evidence, and are not admissible as being material to show that testator had long contemplated the disposition of his property in the manner designated by his will, and hence a lower grade of memory and mental capacity might be required on his part.* *Stevens v. Vancleve*, 4 Wash., 262.

§ 37. *A witness may be asked what opinion he formed of the sanity of the testator at or about the time of the will being made, but not what he said to third persons upon the subject. In weighing the evidence of sanity, that of the attesting witnesses is most to be regarded, because it is more likely that they should be attentive to the conversation and actions of the testator than mere by-standers; and if physicians differ respecting the material symptoms of the disorder, the opinion of the physician who attended his last illness is entitled to more regard than the opinions of physicians who had not this advantage.* *Harrison v. Rowan*, 3 Wash., 580.

§ 38. *The presumption of law is always in favor of the sanity of the testator at the time the will was executed, and the burden of proof lies upon the person who asserts unsoundness of mind, unless a previous state of insanity has been established, in which case the burden is shifted to him who claims under the will.* *Stevens v. Vancleve*, 4 Wash., 262.

§ 39. *To make a valid will testator must have a sound and disposing mind and memory. He need not have a perfect memory, it may be impaired by age or disease; but he must have a disposing memory. He must be capable of recollecting the property he was about to bequeath; the manner of distributing it, and the object of his bounty. His mind and memory must be sufficiently sound for him to know and understand the business in which he was engaged at the time he executed his will. The only point of time to be looked at by the jury, at which the capacity of the testator is to be tested, is that when the will was executed. The evidence of the attesting witnesses and, next to them, of those who were present at the execution—all other things being equal—is most to be relied upon.* *Ibid.*

§ 40. *Capacity to contract.*—In a contract for the personal services of plaintiff there is an implied condition that plaintiff shall be capable of performing such services. So where plaintiff is engaged as superintendent of a hotel, and becomes incapable of attending to the duties of the office, either through insanity or excessive use of opiates, such incapacity operates to terminate the contract immediately, and defendant is not bound to give thirty days' notice as provided in the contract. *Lyon v. Pollard*, 20 Wall., 403.

§ 41. *Where a person received injuries which resulted in concussion of the brain, and while suffering from these injuries made a reckless and ruinous trade, held, that although the injuries did not produce a total eclipse of his mental faculties, if they so weakened and deranged them that he was not capable of comprehending the subject of the contract, and its nature and probable consequences, he was not bound by it; that a party is not bound by a contract entered into where his mental condition is such as to preclude any fair or reasonable exercise of the reasoning faculties.* *Kilgore v. Cross*, 1 McC., 144.

§ 42. *Although a man may not be absolutely insane so as to invalidate any specific contract he might have entered into, yet if he be subject to such a state of melancholy as might well account for his having failed to search out and set up a real defense at law, judgments obtained*

against him during such a state of mind will be relieved against if he possessed such real defense. *Tabb v. Gist*, 6 Call (Va.), 279; 1 Marsh., 88.

§ 43. Where the proofs showed that the grantor was intoxicated during the greater part of his time, and that when intoxicated he was so far insane as to be incapable of doing business, but that he was not intoxicated at the time of the execution of the deed, nor had been for several preceding days, the court refused to set aside the conveyance on the ground of insanity. *Lewis v. Baird*, 3 McL., 56.

§ 44. Whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and reasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. An old woman lived alone in a state of misery and degradation. She had for a long time been eccentric and enfeebled in mind. While these infirmities were aggravated by her last sickness, she made a conveyance of all her property, worth from \$6,000 to \$8,000, for the consideration of \$250 in cash and an annuity of \$500 for the rest of her life. No one was present at the time except the purchaser, his agent and attorney, and she died a few weeks after the transaction. The court was of opinion that she was, if not disqualified, unfitted to attend to business of such importance as the disposition of her entire estate, and, considering the case within the above principle, ordered the conveyance to be set aside. *Allore v. Jewell*, 4 Otto, 506.

§ 45. The degree of weakness or of imposition which ought to induce a court of equity to set aside a conveyance is proper for the consideration of the court itself; and there seems to be no reason for the intervention of a jury, unless the case be one in which the court would be satisfied with the verdict, however it might be found. *Harding v. Handy*, 11 Wheat., 103.

§ 46. Liability for criminal acts.—The accused should not be found guilty of murder, if at the time of committing the act he was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act. *United States v. Clark*, \*2 Cr. C. C., 158.

§ 47. If the mind still acts, if its reasoning and discriminating faculty remains, a state of partial intoxication affords no ground of a presumption in favor of an honest or innocent intention in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same acts when sober. *United States v. Roudenbush*, Bald., 514.

§ 48. The artificial, voluntarily contracted and temporary madness produced by drunkenness is rather an aggravation of than an apology for a crime committed during that state. If, however, an habitual or fixed frenzy is produced by this practice, though such madness is contracted by the vice and will of the party, it places the man in the same condition as if it were contracted at first involuntarily. *United States v. Forbes*, Crabbe, 558.

§ 49. In the case of an indictment of a slave for an attempt to murder his mistress, *held*, that drunkenness is no excuse; but that the intoxication of the prisoner is a fact proper to be considered by the jury in forming their opinion of the intent with which he took the ax and entered his mistress' chamber. *United States v. Bowen*, 4 Cr. C. C., 604.

§ 50. Where a person is insane at the time he commits a murder, such a sanity is a complete defense although its remote cause is habitual drunkenness; but it is otherwise if the crime is the immediate result of a fit of intoxication and takes place while it lasts. *United States v. Drew*, 5 Mason, 28.

§ 51. Although a person was laboring under partial insanity, if he still understood the nature and character of the act and its consequences, and had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he did the act he would do wrong and deserve punishment, such partial insanity is not sufficient to exempt him from criminal responsibility. Where the mind of the accused is merely clouded and weakened, but is not incapable of remembering, reasoning and judging between right and wrong in respect to his particular act, to set up that he was impelled to the commission of the act by an uncontrollable or irresistible impulse is not a successful defense. *United States v. Holmes*, 1 Cliff., 98.

§ 52. If a person can discriminate between right and wrong he is a proper subject for punishment, and this fact can be best ascertained by the acts of the individual. If he attempts to conceal the offense, and dispose of the stolen articles lest they might be identified, to conceal himself for the purpose of eluding the officers of the law, all this shows a knowledge of the offense, which is the real test when the defense is deficiency of mind. *United States v. Shults*, 6 McL., 121.

§ 53. If a person suffering under *delirium tremens* is so far insane as not to know the nature of his act, he is irresponsible and exempt from punishment; but if, while sane and responsible, a person makes himself intoxicated, and, when intoxicated, commits a crime by reason of in-

sanity, which was one of the consequences of that intoxication and one of the attendants on that state, he is responsible and must be punished. *United States v. McGlue*, 1 Curt., 1.

§ 54. Not every kind and degree of insanity is a sufficient defense. A person may be very erratic in his judgment and conclusions and still be responsible. The question is, did he have a criminal intent? If he had the capacity to distinguish between right and wrong as to the particular act, if he understands the nature of the act, if he knows it to be criminal, and that if he does it he will do wrong and deserve punishment, then, in law, he has a criminal intent, and is so far sane as to be responsible for that act. *Ibid.*

§ 55. Life insurance; suicide.—Where a life insurance policy contains a clause providing that it shall be void if the insured shall "die by his own hand," proof of the insanity of the insured at the time he took his own life renders the insurance company liable on the policy, notwithstanding such clause, and any evidence tending to show that the insured was insane when he committed the act that caused his death is proper to go to the jury, and the judge may express his opinion on the subject in cases where the jury are likely to be influenced by prejudice. Testimony of ordinary witnesses as to his conduct, manner and looks, and the impressions made upon them by his appearance and actions, may properly go to the jury as affecting the question of his insanity. Even if the insured knew that the act he committed would result in death, and deliberately did it for that purpose, his mental condition being such that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. *Insurance Co. v. Rodel*, 5 Otto, 232.

§ 56. Where an insurance policy contained a clause annulling the policy in case the insured should "die by his own hand," held, that a person does not "die by his own hand" if he is impelled to the act of self-destruction by an insane impulse, which he has not the power to resist, or if his reasoning faculties are so far impaired that he is not able to understand the moral character, general nature, consequences and effect of his act. *Waters v. Connecticut Mut. Life Ins. Co.*, 2 Fed. R., 892.

§ 57. Where a life insurance policy contained a clause declaring it void if the assured should "die by his own hand," the assured having committed suicide, and suit being brought against the company to recover the amount of the policy, the plaintiff claiming that the assured was insane when he took his own life, the court charged the jury as follows: "It is not every kind or degree of insanity that will so far excuse the act of self-destruction as to make the company liable. To have this effect the mind must be so far deranged as to have made the deceased incapable of using a rational judgment in regard to the act of self-destruction. To make the defendant liable the plaintiff must prove either, first, that the assured was impelled by an insane impulse, which the reason that was left him did not enable him to resist; or, secondly, that his reasoning powers were so far overthrown that he could not exercise them on the act which he was about to do. If the death was caused by the voluntary act of the deceased, he knowing and intending that his death would be the result of his act, and when his reasoning faculties were so far impaired that he was not able to understand the moral character, general nature, consequences and effects of the act he was about to commit; or if he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the contemplation of the parties to the contract and the insurer is liable. . . . The words 'general nature, consequence and effect of the act' refer to the entire act, not only the act by which he took his life, but the result of it, that is, they cover the suicide." *Moore v. Connecticut Mut. Life Ins. Co.*, 1 Flip., 363.

§ 58. Presumption from suicide.—Neither an act of suicide, nor an attempt, nor a threat to commit suicide, standing alone, creates a presumption of insanity that would be sufficient to justify a jury in finding the party insane; but such an act may be considered in connection with the previous demeanor and conduct of the party, as evidence of insanity. *Wolff v. The Connecticut Mut. Life Ins. Co.*, 2 Flip., 355; *Moore v. Same*, 1 Flip., 363.

§ 59. In bankruptcy.—A person who is so unsound in mind as to be wholly incapable of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian. *Quære*: Whether such a person on the petition of himself or guardian may, if insolvent, go into voluntary bankruptcy. *In re Marvin*, 1 Dill., 178.

§ 60. Proceedings in bankruptcy are maintainable against a party under guardianship as a lunatic, against the consent of his guardian; but an insane person cannot commit an act of bankruptcy; so that if the party was insane at the time he committed such acts the proceedings must be dismissed. *In re Weitzel*, 7 Biss., 289; 14 N. B. R., 466.

§ 61. Although a person cannot commit an act of bankruptcy while insane, if he commit such act while sane, he may be made a bankrupt upon petition, his guardian consenting. Whether he can obtain a discharge if unable to take the oath prescribed by the statute, and submit himself to examination, *quære*. *In re Pratt*, 2 Low., 96.

§ 62. A question for the jury.—The question of the insanity of the accused is a question of fact for the jury. *United States v. McGlue*, 1 Curt., 1.

§ 63. The resignation of an officer of the navy while insane is a mere nullity, and cannot be made valid by acceptance; therefore, such acceptance may be recalled by the executive without consulting the senate. Resignation by an Insane Officer,\* 6 Op. Att'y Gen'l, 456.

§ 64. Sale of lands.—Under the statutes of Oregon the application of a guardian of an insane person to sell the lands of his ward is a proceeding *in rem*, conducted by the ward through his guardian in the interest and for the benefit of the ward. The court acquires jurisdiction by the filing of a petition; therefore if it appears by the petition, either from facts stated or by necessary inference therefrom, that the ward has no property or income, and that it is necessary to sell his land to pay debts or for his maintenance, and if the court acquires jurisdiction, its judgment thereon cannot be questioned collaterally except in the cases specially excepted. *Sprigg v. Stump*,\* 7 Saw., 280.

§ 65. Proceeding to determine insanity.—In the absence of a statute prescribing the proceeding for ascertaining who are lunatics the proceeding is by a writ in the nature of a writ *de lunatico inquirendo*. *Burke v. Wheaton*,\* 3 Cr. C. C., 341.

§ 66. Lunatic must be made a party to a suit.—A lunatic whose interests are sought to be affected by a decree must be made a party to the suit. It is not sufficient that process be served against his committee. It must be served against him, in which case his committee answers under an order of the court appointing him for that purpose. If this service has not been made the bill will not be dismissed, but the court will order the lunatic to be made a party; and if such order becomes nugatory by the death of the lunatic, the bill holds good as to the defendant's property before the court. *Harrison v. Rowan*, 4 Wash., 202.

§ 67. The master of a vessel may be restrained by officers and crew if there is evidence sufficient to satisfy a firm and reasonable man of his mental derangement, and that his going at large would endanger the lives of the crew. *United States v. Sharp*, Pet. C. C., 118.

§ 68. The journal kept by the master of a ship, alleged to be insane, may be read in evidence for the jury to judge by the style in which it was written of the sanity of the master during the time in which it was written, but not as evidence of any fact stated in it. *Ibid*.

§ 69. Duty of grand jury.—It is improper to summon witnesses before the grand jury in a criminal case to testify to the sanity or insanity of the accused, as the law presumes every person to be of sound mind until the contrary is proved. The grand jury has no right to send for and examine witnesses to prove mere matter of justification or excuse. *United States v. Lawrence*, 4 Cr. C. C., 514.

§ 70. Funds in the hands of a committee of a lunatic are not in the possession of the court through whose hands they passed to the committee, and which appointed the committee, so as to exclude any other court from adjudicating any question with regard to them. *Sullivan v. Andoe*, 6 Fed. R., 641; 4 Hughes, 290.

§ 71. Commitment for murder—Petition for habeas corpus.—Upon petition for a writ of *habeas corpus* to bring the prisoner, indicted for murder, up for the purpose of examining witnesses to prove his insanity and to discharge him for that cause from imprisonment in the common gaol, the court refused to issue the writ, holding that upon *habeas corpus* the court cannot examine witnesses to prove exculpatory matter when the warrant of commitment was regular and bore upon its face sufficient cause for commitment. *United States v. Lawrence*,\* 4 Cr. C. C., 518.

§ 72. If the jury acquit the prisoner on the ground of insanity, the court will remand him to the custody of the marshal if satisfied that it would be dangerous for him to be at large on account of his mental delusion. *Ibid*.

§ 73. Where one was accused of an assault upon the president, with intent to kill him, and was acquitted on the ground that he acted under the delusion that he was the king of England, and of the United States as an appendage, and that the president stood in his way in the enjoyment of his right, the court remanded the prisoner, being of the opinion that it would be dangerous to permit him to go at large while under this mental delusion. *Ibid*.

§ 74. The defendant being confined in the hospital as a lunatic, the court refused to enter an *exoneretur*. *Bowerbank v. Payne*, 2 Wash., 464.

§ 75. A surety on a bond for jail limits is not liable if his principal escapes from such limits while insane, though it seems that if a person escapes from the custody of the sheriff in such a condition, the sheriff is still liable. *Hazard v. Hazard*, 1 Paine, 295.

§ 76. Service on committee.—Where process was prayed against a lunatic, and also against her duly appointed committee, and the subpoena against her was returned served by service on her committee, *held*, that she was properly summoned, and that the answer filed by her committee should be treated and taken as the answer of the lunatic. *Sullivan v. Andoe*, 6 Fed. R., 641; 4 Hughes, 290.



§ 77. *Action in name of lunatic.*— Where the plaintiff is a lunatic, an action of ejectment is properly brought in his name, as it would not be sustained in the name of his committee or of a guardian. *Gilleland v. Martin*, 3 McL., 490.

§ 78. *Appointment of guardian.*— The courts of probate of Rhode Island cannot appoint a guardian for an insane person without notice to the party and an adjudication on the facts. *Smith v. Burlingame*,\* 4 Mason, 121.

§ 79. The fact that in Oregon the proceedings relative to the appointment of a guardian for an insane person are entered in the books provided for recording county business is immaterial so far as the validity of the proceedings or the admissibility of the record is concerned, the statute of June 4, 1859, being directory merely. *Sprigg v. Stump*,\* 7 Saw., 280.

§ 80. Under the laws of Oregon the petition for the appointment of a guardian for an insane person need not be verified. The provisions of the constitution of that state that no warrant shall issue except upon probable cause, supported by oath or affirmation, apply only to criminal warrants. *Ibid.*

§ 81. Papers from the probate records showing that a person was treated by the probate court as the lawful guardian of a *non compos* will, after lapse of time, be taken as *prima facie* evidence to supply the direct proof of a probate appointment. *Thomas v. Hatch*, 3 Sumn., 170.

§ 82. Under an act of Rhode Island providing "that no guardian shall be appointed or removed, unless all persons interested shall have had reasonable notice in writing," held, that notice by reading the order of the court was not sufficient to render the appointment of a guardian upon such notice lawful. *Hart v. Gray*, 3 Sumn., 339.

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## INSOLVENT AND BANKRUPT LAWS.

See DEBTOR AND CREDITOR.

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## INSPECTOR OF CUSTOMS.

See REVENUE.

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## INSTANCE COURTS.

See MARITIME LAW.

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## INSTRUCTIONS.

See CRIMES; PRACTICE.

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## INSURANCE.

See VOLUME 19.

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## INSURRECTION.

See WAR.

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## INTERCOURSE WITH THE ENEMY.

See WAR.

## INTEREST AND USURY.

See BANKS, NATIONAL; CONVEYANCES, B., XII.]

## A. INTEREST.

## B. USURY.

## A. INTEREST.

I. IN GENERAL, §§ 1-48.

II. WHEN ALLOWED, §§ 49-240.

III. RATE AND COMPUTATION, §§ 241-283.

IV. LEX LOCI, §§ 284-297.

## I. IN GENERAL.

§ 1. In general.—Interest is deemed to be a compensation for not paying money when due. *Bainbridge v. Wilcocks*, 1 Bald., 536 (§§ 63-68).

§ 2. Interest is not assessed as a penalty for default, so much as being, on the whole, the fairest mode of making the plaintiff good. *Greenish v. Standard Sugar Refinery*, 2 Low., 558 (§ 73).

§ 3. Damages.—The measure of damages for a debtor's failure to pay money, or deliver his obligations to pay money, is the amount due with the interest given by the *lex loci contractus*, and as a rule collateral damages cannot be given. *City of Memphis v. Brown*, 1 Flip., 210.

§ 4. A special agreement in a bond as to the damages upon non-payment, if waived by the acceptance of payment after the day, does not affect the right to damages for the delay, measured by interest on the sum. *United States v. Gurney*, 4 Cr. C. C., 333.

§ 5. It is the province of the jury in assessing damages to decide upon the question of interest, and it must be presumed that, if any ought to have been awarded, they have included it in their assessment of damages. The court cannot add interest to the damages found by the jury. *Byington v. Lemmons*,\* Hemp., 12.

§ 6. If the reservation of damages in the condition of the bond is in law only a double penalty, then interest is the legal compensation for the breach of covenant contained in the bond. *United States v. Gurney*, 4 Cr., 333.

§ 7. All damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages. *Loudon v. Taxing District*, 14 Otto, 771.

§ 8. Coupon bonds.—Where a county issues bonds with interest coupons attached, such coupons are not to be considered as a part of the debt incurred by the issue of the bonds. *Durant v. Iowa Co.*, Woolw., 69.

§ 9. Where interest coupons are payable out of the net revenues of a canal company there can be no recovery unless the existence of net revenues is proved. *Corcoran v. Chesapeake & Ohio Canal Co.*,\* 1 MacArth., 367.

§ 10. Interest on municipal bonds may be made payable at another place. *Meyer v. City of Muscatine*, 1 Wall., 384.

§ 11. It being held by the court that bonds of a North Carolina railroad company were intended to be paid in lawful currency, it was held that interest was to be paid in the same currency and not in Confederate money. *Confederate Note Case*, 19 Wall., 543.

§ 12. Without a special agreement to that effect the taking of an interest coupon does not extinguish the interest on the instrument to which it is attached. There is no extinguishment till payment. *The City v. Lamson*, 9 Wall., 477.

§ 13. A city may lawfully contract to pay interest in gold on bonds payable in legal tender notes. *Pollard v. City of Pleasant Hill*, 3 Dill., 195; S. C., 1 Cent. L. J., 155.

§ 14. Banks.—By the charter of a certain bank, if it refused to pay a deposit, the depositor was entitled to receive and recover interest on the same at the rate of twelve per cent. per annum. After suit was brought for the whole deposit and the twelve per cent. interest, the bank paid the actual sum deposited with simple interest, which the plaintiff received. *Held*, that the plaintiff could not recover the additional interest. *Potomac Company v. Union Bank of Georgetown*,\* 3 Cr. C. C., 101.

§ 15. In bankruptcy.—Interest on all claims against a debtor stops running as soon as a petition in bankruptcy is filed against him. *In re Broich*, 7 Biss., 303.

§ 16. Limitations.—Where action is brought on a bond and coupons the statute of limitations cannot be set up to bar a recovery on the coupons more than six years overdue, though

it seems that it might be should a separate suit be instituted on such coupons. *Burton v. Town of Koshkonong*, 4 Fed. R., 378.

§ 17. *Application of payments.*—Where money is paid upon a note the law will apply it first upon the interest and then upon the principal; but where the contract makes a different provision, or the course of business between the parties has established a different usage, the general rule is superseded. So where notes were given by the holder of a life insurance policy to the company, on which the interest was paid by the assured in cash, and the dividends declared by the company to policy-holders were applied to the principal, that course of business was held to modify the general rule, and it was held that dividends declared would not be applied to the unpaid interest so as to save a forfeiture. *Anderson v. St. Louis Mutual Life Ins. Co.*, 1 Flip., 559.

§ 18. *Tender.*—To have the effect of stopping interest or costs a tender must be kept good, and it ceases to have that effect when the money is used by the debtor for other purposes. *Bissell v. Heyward*, 6 Otto, 580.

§ 19. *Where an attachment is laid on money in the hands of a third person, interest stops until the attachment is dissolved; otherwise where a debtor who is also a creditor lays an attachment in his own hands.* *Willings v. Consequa*, Pet. C. C., 801.

§ 20. *Heirs.*—A receipt given by a young man just arrived at full age, for a certain sum, as his share of his father's estate, is not a bar in equity to his demanding the interest and dividends upon the fund to which he was entitled by the terms of the deed of trust. *Nicholson v. McGuire*, 4 Cr. C. C., 196.

§ 21. *Error in calculation.*—If any error exists in the calculation of interest in a judgment on a note, on which suit has been brought, the court before whom the suit was brought may, by the laws of Alabama, correct the error. *Smith v. Clapp*, 15 Pet., 125.

§ 22. *Specific performance.*—It seems that, if interest was payable at certain times according to the terms of a contract, a plaintiff could not enforce specific performance unless he could show that he had paid interest as required. But equity might possibly require him to pay the principal and interest within a reasonable time, or be foreclosed of his rights under the contract. *Tufts v. Tufts*, 3 Woodb. & M., 474.

§ 23. *Miscellaneous.*—Where a statute directs a county treasurer to indorse county warrants presented to him for payment, if there are not funds sufficient to pay them, with a statement to that effect, and provides that interest shall be paid from the time of indorsement, the fact that a treasurer fails to make the proper indorsement will not prevent the owner of the warrant from recovering interest thereon from the county. *Territory v. Gilbert*,\* 1 Blake (Montana), 371.

§ 24. *A conveyance to a married woman stipulated for a lien upon the land for the purchase money with ten per cent. interest.* *Held*, that under the law of Tennessee the lien was enforceable for the interest as well as for the principal. *Bedford v. Burton*, 16 Otto, 338.

§ 25. *Where the law permits interest upon interest, as the laws of Wisconsin did in 1857, no change in the law and no legislative construction of that law can change the right of the holder of negotiable paper to recover interest upon interest.* *Koshkonong v. Burton*, 14 Otto, 668.

§ 26. *A person from whom excessive duties have been exacted precludes himself from maintaining an action to recover interest on such excess by receiving the amount of such excess, though at the time he claimed to reserve the right to do so.* *Riley v. Maxwell*, 2 Blatch., 237.

§ 27. *When the question of interest is expressly reserved at the time of the receipt of the principal, such receipt is no bar to the recovery of the interest.* *Burr v. Burch*, 5 Cr. C. C., 506.

§ 28. *On judgments.*—In a patent case the supreme court of the United States affirmed the decree "with interest until paid at the same rate per annum as similar decrees" bore in the state from which the appeal came up. *Held*, that by "similar decrees" was meant decrees for the payment of money and not decrees in patent causes, and that it was right for the circuit court when the mandate went down to order the execution of the decree by the collection of the money found to be due, and interest at the rate allowed by the local law upon decrees for the payment of money. *Railroad Company v. Turrill*,\* 11 Otto, 836.

§ 29. *Under the law of Illinois money decrees carry interest at the rate of six per cent. per annum, the statutory rate for judgments.* *Ibid*.

§ 30. *An action was brought in the United States circuit court in Iowa upon coupons which were attached to bonds issued by the county of Lee, in the state of Iowa. The coupons were made payable in New York, but contained no provisions as to interest or the rate of interest. The rate of interest in New York was seven per cent. By the statute of Iowa ten per cent. might be stipulated for, but the legal rate was six per cent. in the absence of a written agreement, both upon money due on contract and on judgments and decrees, and where an amount was stipulated for, a judgment on the obligation bore the same rate. Held*, that as no rate was expressed, a judgment on the coupons should bear interest at six per cent. *Rogers v. Lee County*,\* 1 Dill., 529.

§ 31. The city of Hannibal in the state of Missouri issued bonds bearing ten per cent. interest, both bonds and interest coupons being made payable in New York, where the legal rate of interest was seven per cent. The Missouri laws allowed six per cent. when no rate was stipulated, and the parties to stipulate for ten per cent., and provided that judgments upon contracts bearing more than six per cent. should bear the same rate borne by such contracts, and all others six per cent. Suit was brought upon these matured bonds and attached interest coupons in the United States circuit court in Missouri. It was held that the Missouri statutes on the subject must govern; that the plaintiff was entitled to ten per cent. interest upon the principal of his bonds from their maturity to date of judgment, and that thereafter so much of the judgment as related thereto must continue to bear interest at the same rate; that he was entitled to six per cent. on the coupons, as no interest was expressed in them; and that thereafter the portion of the judgment relating to the coupons and accrued interest thereon must continue to bear the same rate of six per cent. *Fauntleroy v. City of Hannibal*,\* 5 Dill., 219.

§ 32. In the territory of Arkansas ten per cent. interest may be contracted for, but the statute provides that a creditor shall be allowed to receive at the rate of six per cent. per annum for all moneys after they become due on bond, bill, promissory note, or other instrument of writing, or on any judgment recovered in a court of record. It is held under this statute that a judgment cannot bear more than six per cent. interest, although the obligation on which it was rendered bore eight per cent., and therefore a judgment cannot be rendered to bear eight per cent. interest prospectively until paid. (Overruling *Henderson v. Desha*,\* Hemp., 231.) *Byrd v. Gasquet*,\* Hemp., 261.

§ 33. Under the statute of Arkansas Territory, allowing ten per cent. interest to be contracted for, but providing that judgments shall bear six per cent. interest, it is held that the judgment merges the contract so far as the interest is concerned, and that a judgment cannot bear or be rendered to bear a higher rate than six per cent., although rendered upon an obligation bearing a higher rate. *Evans v. White*,\* Hemp., 296.

§ 34. Where a judgment recovered in one state is sued on and a judgment entered thereon in another, each judgment bears interest according to the laws of its own state, the first bearing interest only up to the time of the rendition of the second. *Ibid.*

§ 35. Where an action is brought upon an interest-bearing contract, the plaintiff is entitled to interest upon the verdict rendered from the finding of the same until the giving of judgment, where the judgment has been delayed by defendant's motion for a new trial. *Dowell v. Griswold*,\* 5 Saw., 23.

§ 36. The party is as well entitled to interest in an action on an appeal bond as if he were to proceed on the judgment, if the judgment be a contract for the payment of money. He is entitled to interest from the rendition of the original judgment. *Sneed v. Wister*, 8 Wheat., 690.

§ 37. In a *sci. fa.* to subject bail, interest is not allowed on the judgment against the principal. *Anonymous*,\* 2 Hayw. (N. C.), 378.

§ 38. Under the eighteenth rule of the United States supreme court, the mode of calculating interest, when a judgment of the circuit court is affirmed, is to compute it at the rate of six per cent. per annum from the day when judgment was signed in the circuit court until paid. *Mitchell v. Harmony*, 18 How., 115.

§ 39. The original judgment having omitted to name interest, and the United States supreme court having affirmed the judgment as it stood, it was proper for the court below to issue an execution for the amount of the judgment and costs, leaving out interest. *Early v. Rogers*, 16 How., 599.

§ 40. The sixty-second rule of the United States supreme court is as follows: "In cases where a writ of error is prosecuted to the supreme court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered." The same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by the supreme court. This rule to take effect on the 1st day of December, 1852. Before this rule, interest was to be calculated at six per cent. from the date of the judgment in the circuit court, to the day of affirmance in the supreme court. So where a case from Mississippi was affirmed at the December term, 1851, the mandate from the supreme court should have been construed to allow interest at six per cent. from the date of the decree in the court below to the date of the affirmance in the supreme court. And it was erroneous either to allow six per cent. until paid, or to allow the current rate of interest in Mississippi in addition to the six per cent. allowed by the supreme court. *Perkins v. Fourniquet*, 14 How., 328.

§ 41. The act of assembly of Kentucky of the 7th of February, 1812, "giving interest on judgments for damages in certain cases," applies as well to cases depending in the circuit courts of the United States as to proceedings in similar cases in the state courts. *Sneed v. Wister*, 8 Wheat., 690.

§ 42. It is a rule of the supreme court, where there are no special circumstances, to allow six per cent. interest upon the amount of the judgment in the court below, and, under special circumstances, damages to the amount of ten per cent. are awarded. *Bank of Kentucky v. Wistar*, 3 Pet., 431.

§ 43. A judgment cannot be rendered to draw interest from a day prior to its rendition, nor can it fix a higher rate of interest than that allowed by law. *Simmons v. Garrett, McCabon*, 82.

§ 44. In rendering a judgment for money the court should fix the amount then due and render judgment therefor, saying nothing about subsequent interest, which must be collected by the sheriff or other officer, from the date and amount of the judgment, in the same manner as an individual would on a note from its date and amount, according to the rate of interest fixed by law at the rendition of the judgment. *Ibid.*

§ 45. In an action by the United States against R., certain set-offs were introduced by the defendant and a judgment was rendered in favor of the defendant and against the United States. The law of the state in which judgment was rendered provided that interest should be allowed on judgments at the rate of six per cent. *Held*, that the United States was bound to pay interest at that rate on the amount of the judgment. *Reeside v. United States*,\* Dev., 216.

§ 46. Upon the question of the right of the plaintiff to interest upon the verdict, there is no difference between an action of tort and one upon a contract. The verdict in either case fixes the amount due at the time of its rendition, and that amount the party is entitled to have paid him as of that date. *Gibson v. Cincinnati Enquirer*, 2 Flip., 88; 5 Cent. L. J., 446 (§ 245).

§ 47. And if the judgment is delayed by the defendant, as by a motion for a new trial, the plaintiff ought to have interest from the date of the rendition of the verdict. It was so held in an action for libel. *Ibid.*

§ 48. Upon appeals taken by both parties in a case of salvage, the amount found by the district court in favor of the libelants was affirmed, and the libelants asked for interest on the sum allowed from the date of the decree below. The court refused the demand upon two grounds: first, that the libelants had by their own appeal deprived themselves of the right to enforce the decree and caused the delay in the payment of the amount; and, second, that the appeal by both parties had made the amount so much a matter of uncertainty as to render it an unliquidated sum, which does not in general bear interest. *The Rebecca Clyde*,\* 13 Blatch., 403.

## II. WHEN ALLOWED.

**SUMMARY**—*Usage; course of trade*, § 49.—*Settled accounts*, §§ 50, 51, 53.—*Interest by way of damages*, § 52.—*Semi-annual interest coupons*, § 54.—*In admiralty*, § 55.—*Garnishees*, §§ 56, 57.—*Assignees in bankruptcy*, § 58: *executors and other trustees*, § 59.—*Advances on contract*, § 60.—*Uncertain demands and unliquidated damages*, §§ 61, 62.

§ 49. Where the course of trade between two countries has been settled to allow interest in certain cases, it is evidence of a contract to pay it according to the usage. *Bainbridge v. Wilcocks*, §§ 63-68.

§ 50. Where plaintiffs as agents, factors and depositaries of the defendant sued him for advances made and responsibilities incurred at his request, by letter or bill drawn by him on them, and the plaintiffs had struck a balance of principal and interest and rendered an account once in every two years for thirteen years, without any objection on the part of the defendant, the jury were instructed that, as a matter of law, the accounts so rendered were to be considered as stated or settled and as liquidated by the parties, and the balance struck as a debt bearing interest as a matter of contract implied by law, such balance being considered as one debt without regard to the items composing it. *Ibid.*

§ 51. Though an account does not bear interest *a priori*, yet the party receiving the account with interest charged according to usage or custom is presumed to agree to pay it; and this is so if the parties have settled an account according to such usage. *Ibid.*

§ 52. A jury may allow interest by way of damages for non-payment of the principal, though satisfied that there was no express or implied contract for the payment of interest. *Ibid.*

§ 53. Where accounts were rendered at intervals during a long period, the last balance with accrued interest thereon being carried forward each time to the new account, it was held that the law raised a promise to pay the last balance with the interest thereon, though some of the interest accrued during the war and could not have been recovered if it had been objected to in time. *Ibid.*

§ 54. The act of Michigan regulating interest is as follows: Section 7. "The interest of money shall continue to be at the rate of 7% and no more upon the hundred dollars, for a year, and at the same rate for a greater or lesser sum, or for a longer or shorter time." Section 8. "Interest may be allowed and received upon all judgments at law and upon all decrees in chancery, for the payment of any sums of money, whatever may be the form or cause of action or suit, and such interest may be collected on execution." Section 9. "In all actions founded on contracts, express or implied, whenever in the prosecution thereof any amount of money shall be liquidated, or ascertained in favor of either party, it shall be lawful to receive and allow interest until payment thereof." Under this act it is held that coupons, payable to bearer, for semi-annual interest at the rate of seven per cent. upon municipal bonds, bear interest from the time they fall due until paid, the instalments of interest made payable by them being for a sum certain and within the ninth section of the statute. *Hollingsworth v. City of Detroit*, §§ 69-72.

§ 55. The admiralty is not bound by any hard and fast rule on the subject of interest, unless where some statute or positive contract regulates the matter. *Greenish v. Standard Sugar Refinery*, § 73.

§ 56. The liability of a garnishee to pay interest seems to be different in different states. In Massachusetts, if a garnishee owes a debt which by its terms bears interest, he will be bound to pay it as an incident to the principal, though his power of paying it was suspended by the misfortune of an attachment; otherwise if the interest is merely assessable as damages for non-payment. But the court, in this case, regards the distinction as rather a nice one, and does not know whether freight-money withheld bears interest as damages or as impliedly contracted for. The respondents here owed freight-money to the libelants, and were summoned as garnishees at the suit of a third party, and the attachment was dissolved upon the giving of a bond. The court allowed interest at the rate of three per cent. for the time the attachment was pending, and at six per cent. after that time, the respondents having had the use of the money, and the money having been worth three per cent. on call while they had it. *Ibid.*

§ 57. A garnishee is simply a debtor, and if his debt bears interest for any reason or in any mode of assessment, the interest should not stop until the principal is paid. *Ibid.*

§ 58. By the ninth section of the bankruptcy act of 1842, the assignee is required to pay into the registry all assets received in money within sixty days after they come into his hands. The act does not provide that he shall be chargeable with interest from the time that he is required to deposit them, but equity enforces this rule, even though the assignee offers as an excuse the smallness of the sum and the expectation that other property might come into his hands. But the creditors can equitably demand interest only on the sum to be distributed after deducting the charges of administration. *In re Thorp*, §§ 74, 75.

§ 59. Courts of equity charge assignees in bankruptcy, executors and other trustees with interest on money collected and retained in their hands after it ought to be paid over or invested, upon two grounds: either that they have made use of the money themselves, or neglected to invest it for the benefit of the estate. For simple neglect to pay over or invest money, the practice of the English court of chancery is to charge them with interest at the rate of four per cent; and five per cent. if they use the money in their own business. And where there has been gross negligence and the money has been kept by the trustee for a long time, the court in taking the account will direct annual or semi-annual rests to be made, carrying the interest into the principal and making compound interest. These rules have been adopted and steadily acted upon by the courts in this country. *Ibid.*

§ 60. Where a reference had been made to commissioners to ascertain the proper allowance for extra work under a contract to construct machinery and the cost of altering the machinery so as to make it conform to the specifications of the contract, it was held, upon exceptions to the report, that the party for whom the machinery was constructed was not entitled, when an interest account was raised between the parties, to interest upon advances or instalments paid to the builder as the work progressed, pursuant to the contract. *The Isaac Newton*, §§ 76-79.

§ 61. Interest is not enforceable upon uncertain demands, or unliquidated damages, nor on damages demanded for non-performance of a contract. Thus, where the balance rightfully belonging to contractors is to be settled by process of law, and a question as to the right of recovery at all is in contestation, and there is a reasonable color of grounds of defense to the claim, interest is not allowable, in case of recovery, except from the time of the decree of court fixing the right of recovery and liquidating the amount. *Ibid.*

§ 62. According to the ordinary usage of courts, the report of referees fixing the amount of recovery must be regarded as liquidating the uncertain damages so far as to afford *prima facie* evidence that the successful party is entitled to the amount, and to put the other party to the election of tendering its discharge, or afterwards litigating its recovery at the hazard of interest thereon. *Ibid.*

[NOTES.— See §§ 80-240.]

## BAINBRIDGE v. WILCOCKS.

(Circuit Court for Pennsylvania: 1 Baldwin, 586-542. 1882.)

**STATEMENT OF FACTS.**—Plaintiffs were London bankers, and brought this suit to recover the balance due them on account for acceptances and advances made by them to the defendant. There was evidence tending to prove that they had repeatedly, and from time to time, rendered accounts to defendant or his agent. Interest and compound interest were the only subjects on which questions of law arose.

§ 63. *Where an account is of advances made in London and the contract is to be performed there, it is governed by the law of England.*

Charge by BALDWIN, J.

The account between the parties consists of advances made in London by the plaintiffs, who resided there, to the defendant residing here, and payments made on account by the latter in London. The whole course of the transactions and correspondence between them shows that the contract was to be performed in London; the rights and obligations of the parties, the rate of interest, and the rules for its computation, must therefore be governed by the law of England; the remedies on the contract depend on the law of the forum. The relation between the parties is that of agent, factor and depositary on the part of the plaintiffs, and the defendant as their principal; their obligation is to account for the effects which came to their hands; his is to reimburse them for advances made, and responsibilities incurred at his request by a letter or a bill drawn on them. The contract between them is not one implied by a loan, but a special contract of indemnity, arising from the relation between them, governed by the law and usage of merchants, which makes it the duty of a person who draws bills on another without funds, to place them in the hands of the acceptor before the bill is due. Though the acceptor becomes the principal debtor to the holder of the bill, yet he is considered as the surety of the drawer, entitled to full indemnity, if funds are not provided in time; the factor or agent who has accepted on the faith of such contract must be put in the same situation as if it had been complied with punctually. Interest is deemed to be a compensation for not paying money when due; the law of England as to the payment of interest is well settled.

§ 64. *The law of interest.*

On a note payable at a particular day, with interest, it is payable from the date (5 Ves., 803; Coop., 29; 2 Mass., 568; 8 Mass., 221); if interest is not mentioned, then it runs only after the day of payment (2 Burr., 1081); if goods are sold payable at a certain day by a note or bill, if not given, the account bears interest, as if the note or bill had been given, for the obligation to pay is equal. 13 East, 98; 3 Taunt., 157; 2 Camp., 272, 280; 17 Ves., 278. Any instrument of writing by which money is to be paid on a day certain bears interest thereafter; not as damages, but as part of the contract. 3 B. C., 439; 3 Ves., 133, 134. The balance of an account properly stated bears interest from the time of liquidation till the principal is paid, though the debt, from its nature, did not bear interest. 2 Ves. Sen., 365; 2 W. Bl., 761; 3 Wils., 206; 2 Atk., 211. It will be computed on all notes, bills, contracts or debts, which on their face, or the nature of the contract, carry interest (2 Ves., 306), from the day when payable, on money lent (Dick., 307, 308; Bunb., 119); if there is no time of payment, or if payable on demand, then after demand made (1 Ves., 63); on an overdraft on a banker, though a note is taken for it

payable on demand, the interest is due from the usage and course of dealing between banker and customer, and the contract implied therefrom (2 Ves., 302); so on an advance of money by an agent in transacting the mercantile concerns of his principal. 3 Camp., 466, 437. It will be allowed on an account current between merchants, where one has laid out a gross sum for another. *Ridgway's Case*, T. Hard., 285; 1 H. Bl., 305. So on an award to pay the sum due on a balance of accounts on a certain day (3 Camp., 467), or on an award of damages assessed pursuant to a statute (1 M. & S., 173, 174), on an account stated by a master in chancery. 1 P. Wms., 480, 653; 1 Atk., 244. These are the rules which prevail at law as well as in equity, except in cases of bankruptcy; in such cases as the commissioners cannot award damages, the interest is allowed only in cases where it is due by contract, not where it is given by way of damages merely. 1 Atk., 75, 80, 151, 244; 3 B. C., 436, 439, 504, 508; 2 Ves., 295; Rosc., 317, 400. Where the course of trade between two countries has been settled to allow interest in certain cases, it is evidence of a contract to pay it according to such usage (*Doug.*, 361), as the tacit law of the contract presumed to be agreed on by the parties. 3 Caines, 234, 243.

§ 65. *When an account will bear interest.*

Though an account does not bear interest *a priori*, yet the party receiving the account with interest charged according to usage or custom, it is evidence of an original agreement to pay it; so if the parties have settled an account according to such usage. 3 B. C., 439, 508; 3 Wash., 352, 402. In all such cases, the interest accruing from the time when an account is liquidated by the parties, when it is settled or liquidated by presumption of law from the conduct of the parties, or their implied agreement, by an award, a report of auditors or a master, an inquest or a jury, becomes as much a part of the debt due by the contract as the original sum out of which it arose. 2 Burr., 1088.

§ 66. *What is necessary to make a stated or settled account.*

To make an account a stated, settled or liquidated one it need not be signed by the parties; it is enough that it shows a balance or that there is none. 2 Atk., 251, 399. If one merchant sends an account to another in a foreign country, and he keeps it by him any length of time, as two years, without objection, the rule of courts and merchants is that it is understood as a stated account. 2 Ves. Sen., 239; 2 Atk., 251; S. P., 15 J. R., 409, 424. Where the parties live in England, it has been held that not objecting to the account by the second or third post is an allowance of it. 2 Vern., 276; S. P., 1 P. Wms., 653.

The time within which an account shall be taken as a stated one, unless objected to, cannot be definitely fixed; it depends on the circumstances of the case whether an acquiescence or a presumed agreement to the correctness of the account exists. If it does, and the party does not account for his silence, the account is considered as settled to his satisfaction, and the party claiming the balance is not bound to prove the items of his account.

§ 67. *When an account of principal and interest will bear interest.*

The party charged may show errors and omissions apparent in the account, but the burthen of showing them is on him who receives and keeps the account without objection, and the errors must be specified; they will not be corrected on doubtful or only probable testimony, but must be palpable and not to be misunderstood; the party complaining can only surcharge and falsify, but cannot open the account generally unless there has been fraud practiced upon him (2 Atk., 119; 9 Ves., 266; 1 Ch. Cas., 299; 1 Vern., 180; 2 B. C.,



62); it is the law of this country (7 Cranch, 151); and a settled account is not opened by being introduced into a second one. 4 Cranch, 309.

These rules apply to all stated or settled accounts, which bear interest from the time of settlement unless some time for settlement is stated, although part of the balance is for interest. Where regular accounts are settled from time to time, interest on interest is allowed. 3 B. C., 440. Where an account of moneys paid for insurances, and on other transactions between agent and principal, had been rendered annually, and interest charged at the close of every year on the balance, and the interest of each preceding year added to the principal, and no objection was made when the accounts had been rendered, until the expiration of ten years from the first account, the interest so charged was allowed. 3 Camp., 463, 437. Where bankers furnish an annual account without objection, an agreement *shall be presumed* that the balance of principal and interest shall bear interest. 1 B. & B., 423. Accounts between merchants may be settled every half year, on the principle of compound interest. 9 Ves., 223, 224.

It may be allowed where there is a contract implied or it is the usage of trade (2 Ves., 16, 17, 20, 21. *Vide* a very able opinion of the late Judge T. Smith, 4 Yates, 221), or accounts transmitted annually. 2 Ves. Jun., 20, *semb*. It is not illegal (1 Ves., 99); compound interest cannot be *a priori*, but is just after the debt is due. 9 Ves., 224. When it is the custom of a place and the practice of the parties to strike a balance every quarter and render the account, it brings it to the case of a fresh agreement at the beginning of every quarter, to lend the sum then due, which is not illegal. 2 Anst., 496. Acquiescence in an account rendered is not, *per se*, an agreement to it, but it is evidence from which it may be inferred that the party who receives the account without objection thereby agrees to continue this course of dealing, and to retain the balance in his hands rather than to pay it. It is a tacit assent to the terms demanded by the creditor on the face of the account rendered, which is direct notice of his understanding of their agreement; if the debtor is not content, he is bound by every principle of good faith to give notice of his dissent. The balance due is the capital of the creditor, which he leaves in the debtor's hands on paying interest; if it is not recoverable, his capital consists in a dry, barren balance, while his debtor uses it to a profit. The law does not impose such hardship on an ordinary merchant who makes a profit by his dealing, still less on a factor who receives only commissions and interest on his advances; especially in a case like the present. No contract can be more obligatory in justice or mercantile faith, than one by letter promising to provide funds to meet an acceptance by a friend and agent; or an implied one more sacred, than what the law infers from drawing a bill without funds, and its acceptance for the accommodation of the drawer. Nor can there be a case where there can be less ground of complaint, than one where, after such a contract has been violated, the creditor strikes a balance of principal and interest only once in two years, as in the one before you; and if the law will presume an agreement from silence in any cases, it is in this, where accounts had been rendered at intervals of two years without an objection, till the expiration of thirteen years from striking the first balance.

It has been objected that the defendant was in Canton when the accounts were rendered. But it is a conclusive answer to this objection, that Mr. Waln was his agent, so notified to the plaintiffs, who were directed to correspond with him as such; the accounts were received by Mr. Waln, between whom

and the defendant a constant correspondence was kept up. Notice to the agent was notice to the principal; it was the agent's duty to communicate the accounts; and from the evidence there can be no doubt of the fact that they were so communicated and received; but if they were not received in fact by the defendant the law will presume it in this case.

We instruct you, therefore, as matter of law, that the accounts which have been rendered by the plaintiffs, and received by Mr. Waln or the defendant, are to be considered as stated or settled accounts, and as liquidated by the parties; as fully so as if they had been signed by both. The balance struck is a debt bearing interest, as a matter of contract implied by the law, and the balance is considered as one debt, without regard to the items which compose it; the aggregate of principal and interest, due on the old account, is carried to the new, imparting a promise to pay on demand, with interest from its date.

A promise or agreement implied by law is as binding as if made by the party, the legal presumption is in the place of proof by witnesses; if the evidence is in writing or the facts are admitted, the law declares what is the contract which results from them; so if a jury find the facts specially, the legal conclusion is a matter of law. If the facts are contested and the evidence doubtful, the jury will decide whether there was a promise express or implied to pay interest; but if they are satisfied that there was such promise in fact, or that such facts existed as are the foundation for the legal presumption of a promise or agreement to pay it, then interest follows as a matter of law. But though not so satisfied that there was an express or implied contract for the payment of interest, the jury may find it as damages for the non-payment of the principal.

§ 68. *When a charge of interest accrued during a war is recoverable.*

In this case there is no fact in controversy which can affect the question of interest; the account being a settled one, the law raises the promise to pay interest on the balance stated in the last account rendered as a matter of contract, which you will find accordingly. This implied agreement applies as well to the interest on the account during the late war, as to what accrued before or after; the promise which the law raises to pay the whole account carries with it the war interest, though it may not have been recoverable had it been objected to in time; there is no law which makes such promises illegal, or which can prevent the plaintiff from recovering it on an express or implied promise after peace. Our opinion therefore is, that in point of law the plaintiffs are entitled to interest as stated in their account. (Verdict for plaintiffs for simple interest.)

#### HOLLINGSWORTH v. CITY OF DETROIT.

(Circuit Court for Michigan: 3 McLean, 472-479. 1844.)

#### Opinion by the COURT.

STATEMENT OF FACTS.— The case was submitted to the court on the following facts: Hollingsworth is the holder of a considerable amount of the bonds of the city of Detroit, payable at a distant period, with interest, payable semi-annually, on the 1st of May and the 1st of November. Coupons, as they are called, are attached to these bonds, each of them for the interest as it falls due, being a coupon to each bond for each semi-annual instalment of interest. These coupons are in the following terms, varying only as to the period when they fall due: "The city of Detroit acknowledges that there will be due Rob-

ert Hollingsworth, or bearer, on the 1st day of May, A. D. 1841, \$35, being for semi-annual interest on bond No. 44, of the seven per cent. loan." Signed, H. Howard, mayor, etc.

The plaintiff holds many thousand dollars in these bonds, and a large amount of coupons in arrear. These coupons are the subject of this suit, and the controversy arises upon the question whether the judgment of the court shall be for the amount of the coupons without interest, or whether interest shall be added from the time they became due.

The seventh, eighth and ninth sections of the act of Michigan, which regulates interest, are as follows: Seventh section. "The interest of money shall continue to be at the rate of \$7 and no more, upon \$100, for a year; and at the same rate for a greater or lesser sum, or for a longer or shorter time." Eighth section. "Interest may be allowed and received upon all judgments at law, and upon all decrees in chancery, for the payment of any sums of money, whatever may be the form or cause of action or suit, and such interest may be collected on execution." Ninth section. "In all actions founded on contracts, express or implied, wherever, in the prosecution thereof, any amount of money shall be liquidated, or ascertained in favor of either party, it shall be lawful to receive and allow interest until payment thereof."

If this question be examined on the broad basis of equity and reason, uninfluenced by the decisions of courts, no one could entertain a doubt on the subject. That these coupons are not usurious is clear. No more than the legal rate of interest is claimed on them, after they became due and the city failed to pay them. The coupons were negotiable by delivery; and no question is made whether, when due, a demand of payment was made, or whether such demand was necessary. The point not being raised need not be considered.

As a new proposition, it would seem to be unaccountable how any one could doubt that the holder of these coupons, negotiable by delivery and payable to bearer, should not be entitled to receive interest on default of payment, the same as in every other case, on a failure to pay a certain sum. The coupons are separated from the bonds, and must be considered as a promise to pay a certain sum of money at a future time, on the consideration of interest then due. Now, it is admitted that such an instrument would be valid, and if not paid at maturity would draw interest, if given after the interest is payable; but not valid, it is contended, as to the payment of interest, if executed before the interest is payable. The promise of payment is substantially the same in each instrument, and the only sensible distinction is, that in the one case the promise is to pay a sum for interest then due, and, in the other, when it shall become due. In both instruments the sum is specific, and the consideration a good and valuable one — the accumulation of interest. To make any distinction between these cases would seem to savor more of legal nicety than sound logic. The reason given in the decisions is entirely unsatisfactory.

#### § 69. *English views as to compound interest.*

In *Connecticut v. Jackson*, 1 John. Ch., 13, Chancellor Kent says that "it may be considered as a doubtful question, on the ground of the ancient authorities, whether the assignee of a mortgage, on a bill to redeem, be not entitled to interest on the whole sum which he paid. Nor are the imperfect cases, in the reign of Charles II., uniform or consistent, even on the general question whether compound interest can be allowed, for the *dicta* are both ways." But the cases decided since the Revolution of 1688, in England, Chan-

cellor Kent says, have established the rule that, except in particular cases, governed by special circumstances, compound interest was not allowable.

In the case of *Waring v. Cunliffe*, 1 Ves. Jun., 99, Lord Thurlow said, "my opinion is in favor of the interest upon interest; because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the court in a constant habit of thinking the contrary, and I must overturn all the proceedings of the court if I give it. This is the general rule, but it is competent to the court to order even compound interest when justice requires it." *Nightingale v. Lawson*, 1 Brown's Ch., 433; *Danford v. Danford*, 12 Ves., 127; *Raphael v. Boehm*, 11 Ves., 11.

§ 70. *Compound interest charged against a trustee.*

In cases of trust, a court of chancery will direct the trustee to pay interest upon interest, where he has used the money in his hands and neglected to account. Compound interest is not forbidden by the statute against usury, but it is held to be iniquitous, and chancery will not decree it, though agreed to by the parties. 2 A. K. Marsh., 335, 339; *Mowry v. Bishop*, 5 Paige, 98; *Lewis v. Bacon*, 3 Hen. & Munf., 89. It will be allowed on a special agreement in writing, prospective in its operation, and entered into after the lawful interest has become due. *Van Benschoten v. Lawson*, 6 John., 6, 331.

§ 71. *Cases in which compound interest is chargeable; regular accounts, etc.*

In the case of *Faber v. Cantfield*, 3 Hammond, 17, "the debtor agreed, in 1807, that upon the principal and interest then due he would pay the interest annually. This agreement he failed to perform. In 1812 he acknowledged the existence and obligation of the agreement, and settled the account according to it, and gave his notes for the amount, and the mortgage to secure the payment." This was set up against the mortgage, but the court held the interest was rightly paid. And again, in *Watkinson v. Root*, 4 Hammond, 372, where the parties made a contract in April, 1826, by which the defendant agreed to pay to the plaintiff \$4,586 in four equal annual payments, with lawful interest, to be paid annually; an action was brought for the interest, and the only question was, whether interest was allowable upon the successive annual charges of interest, after they fell due. And the court say, such a contract is prohibited by no statutory provisions, and we see no reason why it should not be enforced. New Hampshire Rep., 179, is to the same effect. Where regular accounts are settled from time to time, interest on interest is allowed. 3 Brown's Ch., 440. Where bankers furnish an annual account without objection, an agreement shall be presumed that the balance of principal and interest shall bear interest. 1 Ball & Beatty's Rep., 422. Accounts between merchants may be settled every half year, on the principle of compound interest. 9 Ves., 223, 224. It may be allowed where there is a contract implied, or it is the usage of trade. 2 Ves., 16, 17, 20. In *Hammond v. Bell*, 5 Barn. & Ald., 34, Chief Justice Abbott said, "it is now settled that a party advancing money to another is entitled to charge interest, and at the end of every year, then to add the principal to the interest." 1 Baldwin, 536: "compound interest is not illegal, and may be recovered on express promise, or on one implied by law, as a part of the contract."

A promissory note given for the payment of interest upon interest, which had previously become due, is valid. *Wilcox v. Howland*, 23 Pick., 167. In the same case it is said, "if a party holding a note payable at a future time,

with interest annually, lets the time run by without demanding interest, he cannot afterwards, in an action on the note, recover compound interest." Yet he may sue for each instalment of interest as it becomes due. *Cooley v. Rose*, 3 Mass., 221; *Greenleaf v. Kellogg*, 2 Mass., 568. "It is not illegal to stipulate for compound interest, or that interest as it becomes due shall be converted into principal, and carry interest." *Kellogg v. Hickok*, 1 Wend., 221. If the debtor, instead of paying interest when it becomes due, gives his note or bond for it, there is no legal objection to enforcing the payment. *Id.*

From the above citations it appears that the earlier decisions in England had not clearly settled the rule in regard to compound interest. There are *dicta* both for and against it. But the more modern doctrine in England is, that "compound interest cannot lawfully be demanded and taken, except upon a special agreement, made after the interest has become due." And that a note given for the payment of interest before it has accrued is not valid. This doctrine was laid down and followed by Chancellor Kent, in 6 John. Ch., above cited. It is founded upon the consideration that "interest upon interest, promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to influence the avarice and harden the heart of the creditor."

Now it is admitted that there is no law prohibiting such a contract. But the courts have adopted the rule from notions of policy. All the authorities admit that the interest, payable annually or semi-annually, may be demanded and recovered as it becomes due, and that a note given for it may bear interest. And yet, when the loan is first negotiated, an agreement to pay interest on the interest after it becomes due is not valid. The reasons for this distinction are unfounded in fact. It is supposed that the interest being due, and the debtor being pressed for its payment, would be less likely to yield to the avarice and hardness of heart of the creditor, than when the loan was at first negotiated. Is not the converse of this true? When the loan is made, the borrower is generally sanguine that he shall be able to pay the interest, at least, as it shall become due. And if he fails to do this, he agrees to pay interest upon the amount of interest which he has failed to discharge. The essence of the agreement is, that the borrower shall pay the interest punctually as stipulated. Now, if he does not pay, does he not withhold from the creditor his due, and is it unreasonable that interest should be paid, as in all other cases, where there is a failure to pay money when due?

But when the interest is due, the "hard-hearted" creditor demands the payment of it, and if not paid, he may resort to legal coercion. Here the judicial shield might protect the creditor with a better grace, and with greater propriety, than against a contract to pay interest upon interest, made under more favorable circumstances. The fact is, this judicial legislation, to get rid of express contracts which are not made in violation of law, is wrong in principle.

The rapid accumulation of interest is another objection made to this mode of computation. This objection has no better foundation than the negligence of the borrower. He is not presumed to be punctual in paying the interest when due, and he must be protected in this indifference to his contract against his hard-hearted creditor. In other words, the creditor is more lenient than justice required, or the debtor had any right to expect; and for this lenity by

the creditor, and indifference to his obligation by the debtor, he shall be the gainer, and the creditor the loser. Now this argument is as unsound in morals as it is in logic. Such a principle might be established by an arbitrary legislative enactment, but it is not sustainable as judicial legislation.

The powerful mind of Lord Thurlow would not yield to such logic, but he was governed by the force of precedent. Precedents are not to be lightly regarded, but when they subvert contracts, and are founded in error, they should be abandoned. Prior to the reign of Henry VIII., usury, that is, the taking of interest, was deemed a crime, in the language of an attorney-general of England, to be classed with murder and treason. In modern times, a usurious contract is only void in whole or in part because it is made so by statute.

Where an individual agrees to pay the sum of \$100 on a certain day, but fails to do it, can there be any difference whether that sum was due for property purchased, or for the use of money at a legal rate of interest? The consideration in the one case is as good as in the other, and interest on the failure of the debtor is recoverable in either case.

§ 72. *Coupons on municipal bonds payable to bearer bear interest from their maturity.*

The case under consideration is stronger than where the payment of interest is regulated by the principal bond. The coupons were given for the different instalments of interest as they became due, and were made payable to bearer. On their face was expressed that the amount was due for interest, etc. The coupons could have been made payable to bearer for no other purpose than to give them currency. They passed as bank notes payable to bearer pass. The coupons acknowledged a sum to be due in each, and this brings them within the ninth section of the act of Michigan, above cited, which gives interest. It is notorious that the city was unable to pay the interest as it became due, and it could not have been collected by legal means. But now the city opposes the claim of interest on interest, under the precedents stated. These precedents are opposed by other decisions, and by every consideration of sound policy, of morals, of logic and of law. A want of punctuality in the payment of their engagements, by public bodies, is injurious to the community at large. It introduces a loose morality and works a pernicious effect upon society.

We think that these instalments of interest, made payable by these coupons, being for a sum certain, were expressly within the ninth section, and that the interest is recoverable from the time the city failed to pay it.

#### GREENISH v. STANDARD SUGAR REFINERY.

(District Court for Massachusetts: 2 Lowell, 553-555. 1877.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—A somewhat nice question is raised in this case: whether the defendants should be decreed to pay interest on the freight found due from them. They were summoned in the superior court of the state as trustees or garnishees of the owners, before the cargo was fully delivered, in May, 1876, and that attachment was discharged by bond with sureties in October, 1876, of which fact they were notified. It seems to be clear that, from the time the attachment was discharged, they could be excused from the payment of interest only by a tender of the amount which they admitted to be due, and which I have found to be the true amount.

The question is, whether, for the time that the funds were under arrest, they are chargeable. Upon this point there is great diversity of practice. In some states it is held that a garnishee is excused from paying interest, unless it is proved that he has made it; in others, that he is liable for it unless he proves that he did not make it; and in still others, he must pay the money into court if he would be relieved of this charge. In Massachusetts the rule appears to be that if the garnishee owes a debt which by its terms bears interest he will be bound to pay it, as an incident to the principal, though his power of paying was suspended by the misfortune of an attachment. *Adams v. Cordis*, 8 Pick., 260. And, on the other hand, that he will not be bound to pay it while an attachment was pending, if it is no part of the contract, but is merely assessable as damages for non-payment. *Oriental Bank v. Tremont Ins. Co.*, 4 Met., 1; *Rennell v. Kimball*, 5 Allen, 356. The distinction is rather nice, unless by contract is meant an express contract, because in debts due *ex contractu* it is difficult to draw the line between an implied promise to pay interest after demand, or after the debt is due, and a liability to pay the same interest, *ex debito justitiæ*, as damages. Rent, for example, is held in many of the states, and I suppose in Massachusetts, to bear interest without a demand, and I suppose freight does, but whether as damages or as impliedly contracted for I confess I do not know; but an express contract may perhaps be held to overrule all considerations of a general character.

In some cases stress is laid upon the money not having been paid into court or set apart. I know of no right that a garnishee has to set money apart, or invest it, with or without interest. He is simply a debtor; and if his debt bears interest, for any reason, or in any mode of assessment, I hardly see why the interest should stop until the principal is paid. Interest is not assessed as a penalty for default, so much as being, on the whole, the fairest mode of making the plaintiff good; and it is often assessable when the defendant has been unable to pay or tender the amount due, through some misadventure or other beyond his control.

§ 73. *Where respondents were garnished in a state court and did not tender the amount they were assessed interest.*

However, I do not think the admiralty is bound to any hard and fast rule on the subject, unless where some statute or positive contract regulates the matter. The defendants had the use of the money, and money was worth, it seems, three per cent. a year on call, while they had it, and they are traders. I think the true settlement for this case is to allow interest at the rate of three per cent. for the time the attachment was pending; and I consider six per cent. to be due, as matter of law, after that obstruction was removed.

*Decree accordingly.*

IN RE THORP.

(District Court for Maine: Daveis, 290-294. 1846.)

STATEMENT OF FACTS.—The only question raised in this case was whether the assignee was chargeable with interest on money in his hands.

Opinion by WARE, J.

The objections of the creditor to the charges of the assignee, I feel no difficulty in overruling. It appears, from his statement, that he had considerable difficulty in disposing of the property. He obtained an authority in the first instance to sell by auction. But having reason to believe that a combination

was formed between the bankrupt and his neighbors, to prevent competition at the sale, for the purpose of allowing the property to go back to the bankrupt at a nominal price, he applied to the court and obtained authority to sell at private sale. Under this authority he sold the property, which was a small piece of land and all the assets of the bankrupt, for \$75, which was believed to be a fair price. The assignee appears to have acted with prudence and good judgment, and for the best interest of the creditors, and his charges are moderate and not at all beyond what are allowed in such cases.

He received the money in April, 1844, and deposited it in January, 1846. By the ninth section of the bankrupt law the assignee is required to pay into the registry all assets received in money, within sixty days after they come into his hands. In this case the assignee retained it about a year and a half after the law required him to deposit it in court. For this time, the creditor contends that he ought to pay interest. But the creditors can equitably demand interest only on the sum to be distributed, after deducting the charges of administration. These amount to \$42.45, leaving but \$32.95 for distribution. The assignee makes no objection to being charged with interest, although he offers as an excuse for not depositing the money the smallness of the sum and his expectation that more property might come into his hands, and that he delayed paying the money over in order to make, of so small a sum, but a single deposit.

§ 74. *Liability of trustees for interest. Under what circumstances liable for compound interest.*

The principles on which courts of equity charge assignees in bankruptcy, executors and other trustees with interest on money collected and retained in their hands after it ought to be paid over or invested, are, perhaps, as well settled as any rules in equity jurisprudence. The general result of all the cases is stated by the master of the rolls, in *Rocke v. Hart*, 11 Ves., 58, to be that they are charged with interest on two grounds: either that they have made use of the money themselves or neglected to invest it for the benefit of the estate. For a simple neglect to pay over or invest the money, when that is part of their duty, the practice of the court of chancery in England is to charge them with interest at the rate of four per cent. But if they use the money in their own business, they are charged interest at five per cent. And if they mix the trust money with their own, as by depositing it to their own credit with a banker, they are presumed to use it in their trade or business. *Treves v. Townshend*, 1 Brown, Ch., 384; *Newton v. Bennett*, id., 361. Where there has been gross negligence, and the money has been kept by the trustee for a long time, the court, in taking the account, will direct annual or semi-annual rests to be made, carrying the interest into the principal and making compound interest. *Raphael v. Boehm*, 11 Ves., 92; *S. C.*, 13 Ves., 407. These rules have been adopted and steadily acted upon by the courts of this country. The general principle on which the court acts is that the trustee shall not be allowed to make a profit out of the trust property for his own benefit. If he uses the trust money in his own business or trade, it is a breach of trust, and he is held to account for all the profit he has made by the use of the money, but if, in this misappropriation of the trust fund to his own use, there is a loss, it must be borne by himself. The rule of the court may appear to have something of rigor and severity in it, but it is firmly upheld in practice. All the profit, as far as the trust money can be followed, shall go to the *cestui que trust* or equitable owner, but all the risk of loss is imposed on the



trustee as a penalty for the violation of his duty. 2 Story's Equity, §§ 1277-8; *Schieffelin v. Stewart*, 1 John. Ch., 620; *Duncomb v. Duncomb*, id., 508. The object of this strictness is, to secure a faithful administration of the trust by removing from the trustee all temptations to a departure from his duty, as well as to do justice to the *cestui que trust*.

The rules adopted by the courts of equity on this subject substantially agree with the decisions of the Roman law, from which they were perhaps borrowed. By that law a tutor was allowed six months to invest the money of his pupil or ward, which he received at the time of his appointment; and if not invested in the purchase of land, or loaned within that time, he was charged with interest for simple neglect. Dig., 26, 7, 15. But for money which he afterwards collected in the administration of the trust, he was allowed but two months. Dig., 26, 7, 7, § 11. If he applied the money to his own use, he was not charged merely with the customary interest of the place *ex more regionis*, but was held to pay *gravissimas seu legitimas usuras*, a higher rate of interest by way of penalty for a breach of trust, as a court of equity will charge a trustee with compound interest under the like circumstances. Dig., 26, 7, 7, § 10; Voet. ad Pand., 26, 7, 9. Such a coincidence on a particular subject between two highly cultivated systems of jurisprudence, whether the decisions of one were borrowed from the other, or the courts of both were led to the same conclusions by independent reasoning, serves but to show that the doctrines are founded in natural justice and in a wise policy.

§ 75. *An assignee in bankruptcy is required to pay into the registry all money received within two months after its receipt. He is chargeable with interest after that.*

In the present case I am fully satisfied that the assignee acted with conscientious fidelity in administering on the estate, and made the most that he could out of it for the benefit of the creditors. The amount with which he is on any principle chargeable is but a trifle, but the principle involved is important. The law requires the assignee to pay into the registry all money within two months after it is received, giving the same time to pay over money which a Roman tutor was allowed to re-invest money that he had collected. It does not add in default of paying within the time that he shall be charged with interest. But having fixed the time for paying or depositing the money, the law of equity comes in and says that, if not paid at the time, the assignee shall be chargeable with interest, if he has not a reasonable excuse for not complying with the order of the statute. When the sum is small, or the assignee is prevented by the distance of his residence from the court, or other causes, from depositing money punctually, the rule is not so rigorous but that a reasonable indulgence may be allowed as to the time. In the present case interest will be charged for one year and a half.

#### THE ISAAC NEWTON.

(District Court for New York: Abbott's Admiralty, 588-596, 1850.)

STATEMENT OF FACTS.—Reference to commissioners to ascertain the proper allowance for extra work under a contract to furnish engine and boilers for a boat, and the cost of altering the boilers so as to conform them to the specifications of the contract; also, as to payments by claimants for wharfage, insurance, etc.

## Opinion by BETTS, J.

The exceptions taken by both parties relate substantially to the allowance of \$5,000 made by the commissioners to the claimants, because of the insufficient or defective construction of the boilers by the libelants; the one party contending it is too high, and the other that it is insufficient and short of the injury proved. To this point, it appears, the main attention of the commissioners was directed in taking proofs, and on the argument before them.

The testimony taken in court on the hearing was laid before them, some of the same witnesses were re-examined by them, and additional ones were produced, to the end that this branch of the case might receive the most searching and detailed consideration.

Much of the evidence upon this point was necessarily hypothetical, and, as might be expected, widely variant in its suggestions and inferences. This difficulty was perceived and felt by the court on the hearing, and the reference in the case was directed chiefly in order to have facts of this character presented to men of practical experience, who could better appreciate the application and effect of the testimony than the court could hope to do, and whose judgment would be framed with higher advantages for accuracy than the court could expect to command on a hearing in its presence. The commissioners were selected with a view to their qualifications in respect to all matters which were to be brought before them. They have given, it seems, a full and patient hearing to the parties, and the result of their examination of the subjects is expressed in the report signed by them and on file. I do not feel that the argument on the exceptions has brought to my mind any well-grounded cause for disapproving that result.

The commissioners have not particularized the defects they discovered in the construction of the boilers, nor pointed out what changes they regarded as important to be made, nor designated the manner in which the sum of \$5,000, allowed by them on account of the deficiency of the boilers, could be applied to their improvement or alteration so as to produce the amount of steam required by the contract. The order of reference did not enjoin upon them the duty of so doing. Their attention was most carefully called to the point, on the part of the libelants, that the head of steam demanded, according to the decree, could be readily and certainly secured without any alteration of the boilers, and the witnesses gave in full their theories upon that hypothesis. Their estimates brought the expenses, for any useful changes which could be proposed, down as low as three or four hundred dollars for each boiler.

These theories and estimates were combated by testimony on the part of the claimants, who considered it must cost six or seven thousand dollars for each boiler, to place them in a condition to supply the steam demanded by this engine.

§ 76. *In cases of reference to experts to ascertain and report upon facts appertaining to their calling or experience, it appears to be the settled rule to adopt their decision, unless there is manifest preponderance of testimony against it.*

The exposition of the reasons upon which the decree was founded shows that it was not contemplated by the court to adjudicate the point that an alteration in the shape or size of the boilers must necessarily be made. The decree indicated distinctly the object to be attained, and which this engine and apparatus (including the boilers) have failed to accomplish, and the advice of competent officers or commissioners was invoked to determine what expense

would be necessary to effect that object. Two of them are men of extensive experience in these matters, and their opinions, after hearing all the proofs, both as to the necessity of changes in the construction of the boilers and the cost involved in such changes, must necessarily have great weight in determining the judgment of the court on the subject. The inquiry related solely to matters of fact and mechanical expediences, and I should distrust any conclusions of my own at variance with the judgment of the commissioners on such particulars.

Had these gentlemen sat with the court in the capacity of auditors, on the hearing, I should have deferred to their judgment on facts of a professional character, as justly entitled to control my own when not palpably in conflict with the testimony. And although in reperusing the proofs taken at the hearing, and reading over carefully that given before the commissioners, I might regard it as tending to prove that a much greater outlay would be required to place this engine in the condition stipulated for in the agreement, yet if I had possessed the advantage of a personal conference with them, their explanations of matters merely mechanical might well have convinced me that my impression was erroneous, and that their opinion was most to be relied upon.

In cases of reference, out of court, to experts to ascertain and report upon facts appertaining to their calling or experience, it appears to be the settled rule of law to adopt their decision, unless there is a manifest preponderance of testimony against it. *Doyle's Adm'rs v. St. James Church*, 7 Wend., 178. Such is also the established usage with maritime courts in reviewing the decisions of inferior tribunals upon matters of fact.

There are various ways, in consonance with the evidence, in which material alterations may be made in the apparatus for generating steam, without an expense exceeding \$5,000, and the judgment of the commissioners, whether these methods would be efficacious and sufficient, is more satisfactory to the court than its own opinion would be, not so aided, upon subjects so purely mechanical and professional. The minor exceptions were not pressed on the argument, and I discover no cause for departing from the conclusions adopted by the commissioners in the allowances made by them to the parties respectively in these particulars. The report is accordingly confirmed in all its parts.

§ 77. *In the settlement of a controversy over a balance due for work and materials, a party is not entitled to interest on instalments paid during the progress of the work pursuant to contract.*

The libelants insist they are entitled to interest upon the balance which the court may decree them, from the delivery of the vessel and engine to the claimants. The question of costs is also involved in the decree to be finally rendered. On the 8th of October, at which time the libelants claim their contract was fully performed, they had been paid from time to time, as the work progressed, according to the provisions of the agreement, the sum of \$35,000. The claimants contended that, if an interest account is raised, they are entitled to receive it on these advances.

This claim manifestly cannot be supported. The advances were to be made before the claimants could have any possession or use of the work, and accordingly interest on those advances, or their present value in relation to the time of the completion of the contract, must have entered into the contemplation of the parties, and be deemed adequately provided for in the terms or consideration upon which the work was to be done. In effect, the interest on these

payments as respectively advanced, in addition to the price named, \$46,000, would be the stipulated or contract price for the work and materials.

§ 78. — *nor is interest recoverable on a balance found to be due, where the amount is uncertain and a suit is necessary to its adjustment.*

Had the claimants accepted the work on the 8th of October as a performance of the contract, there could be no question of the legal and equitable rights of the parties in respect to interest. It would become, from such delivery, a portion of the unpaid debt due the libelants, continuing to run with the debt until that was satisfied by the claimants. At least, interest would have run from the time the suit was commenced, which was only two days after, notwithstanding the contract was special. *Foster v. Heath*, 11 Wend., 478.

This is on the idea that the agreement is entirely fulfilled on the part of the libelants, and that they are justly entitled to the compensation stipulated; for, as a general rule, interest cannot be enforced on uncertain demands, or unliquidated damages, nor on damages demanded for non-performance of a contract. *Hittings v. Consequa*, Pet. C. C., 172; *Buckmaster v. Grundy*, 3 Gilm. (Ill.), 626; *Speer v. Van Orden*, 2 Penn., 652. Nor is interest allowed when more is demanded than is due, or upon uncertain demands which are to be settled by process of law. *Doyle's Adm'rs v. St. James Church*, 7 Wend., 178; *Hill v. Hall*, 20 id., 51.

In this case, not only was the balance rightfully belonging to the libelants to be settled by process of law, but also a question vital to the right of recovery at all, was in contestation in the suit, with at least reasonable color of grounds of defense on the part of the claimants. They could not, accordingly, be justly required to recognize the demand or make any tender for its satisfaction until after the decree of the court had fixed the right of recovery, and the report of the commissioners had liquidated the amount.

It is true both parties dissent from the report, and by their exceptions appeal to the court to set it aside;—the libelants, because it awards them greatly less than their just dues, and the claimants, because it undervalues the damages they have sustained, and which were to be deducted from the contract indebtedment. Still, according to the ordinary usage of courts, the report of referees must be regarded as liquidating the uncertain damages so far as to afford *prima facie* evidence that the libelants were entitled to that amount, and to put the claimants to the election of tendering its discharge, or afterwards litigating its recovery at the hazard of interest thereon.

§ 79. — *but interest may be recovered on a balance found due by referees, from the time of filing the report.*

I shall, therefore, allow interest on the balance of \$6,347.40 so reported by the commissioners, at the rate of six per cent. per annum, from July 3, 1849, the day the report was filed in court, and thus became legal notice to the claimants. It is not made to appear, upon any evidence before the court, that the very unusual delay in closing this case, which has intervened, since the decision upon the merits, is ascribable to any fault of the claimants, and accordingly interest will not be carried back further than the term the report was brought into court.

The libelants, as actors, had the efficient control of the cause, and might have speeded its decision at their option. Had their efforts to do so been thwarted by acts of the claimants, an equity might then have arisen to interest on the balance ultimately adjusted, during the period of such interception or procrastination of their suit. Here the delay was either their own or was ac-

quiesced in by them; and affords no equitable ground for the allowance of interest during its continuance.

I discern in this case no principle distinguishing it from those to which the ordinary rule in respect to costs applies; which is, that the successful party recovers with the amount in his favor the costs which have accrued in prosecuting his right. The case has been litigated in good faith, no doubt, on both sides. Had the demand been defeated *in toto*, full costs would have been awarded in favor of the claimants, and the converse of the principle is properly applied to them when their adversaries are the successful party.

The defense put in issue the right of the libelants to any compensation, or to maintain a suit upon the contract. They may be fairly held to take the advantages of a defense so comprehensive and entire, together with its hazards. If it succeeds, they stand discharged of the suit with their costs; and if it fails, the balance justly reclaimable from them should be paid with the taxable costs created in enforcing its collection.

*Decree accordingly.*

§ 80. In general.—P. was a partner in the house of D., P. & Co., who were the agents of V., and as such sold to C. certain merchandise consigned to them by V., for which C. refused to pay because of a private claim set up by him against D., one of the partners. Said firm afterwards consigned to V. an invoice of mahogany for sale, ordering the proceeds thereof to be passed to the sole credit of P. Said mahogany was sold accordingly, and V. subsequently died, having a balance due to him from the firm. Previous to his death V. had written a letter to the firm, fixing the balance, and signifying his intention to appropriate the amount as a set-off *pro tanto* to his debt. V.'s administratrix filed an injunction bill, seeking to restrain proceedings at law to recover the proceeds of the sale of the mahogany. It was held, *inter alia*, that interest was due on the proceeds of said sale from the time when V. first claimed a lien or set-off upon them in virtue of the balance due from the firm up to the time of judgment. *Vose v. Philbrook*, 8 Story, 335.

§ 81. Where a debt not bearing interest is attached on trustee process against the creditor, interest will not be allowed against the debtor in favor of the creditor pending such attachment. *Bridges v. Sheldon*, 18 Blatch., 507.

§ 82. Where specie shipped for the purpose of purchasing a return cargo was used by the master for repairs, it was held that the shipper was entitled to interest on the sum used from the time he would have been able to use the money at the port to which it was shipped. *The Mary*, 1 Spr., 51.

§ 83. C. requested A., upon his, C.'s, death, to deliver moneys left with him for that purpose to certain persons designated. C. having died, and G., as his administrator, having sued to recover the funds, and it appearing that the request of C. did not amount to a valid testamentary disposition of the property, it was held that G. was entitled to the funds, but was not entitled to interest as against A. *Grattan v. Appleton*, \* 8 Law Rep., 116.

§ 84. The plaintiff was brought into the United States when eleven years old, having been born a slave in the island of Jamaica, and remained in the service of his previous owner, the defendant, until he was ——— years of age; at the age of twenty-five he made an agreement to purchase his freedom, and paid \$325 towards it. Having subsequently learned that he became free through the operation of the act of congress of March 2, 1807, the plaintiff brought a suit to recover the sum. It was held that as this was an equitable action, and as the money was paid by the plaintiff and received by the defendant under the impression and belief that the defendant had a right to claim the plaintiff as her slave, the latter ought not to recover interest for the money he had paid. *Curranes v. McQueen*, 2 Paine, 109.

§ 85. Where a defendant refused to account or make payment, or converted money to his own use, interest is allowable from the time of a demand made. *Pope v. Barrett*, 1 Mason, 117.

§ 86. Interest is not allowed on partnership accounts until after balance is struck or a settlement between the partners. *Dexter v. Arnold*, 3 Mason, 294.

§ 87. An allowance of interest on the amount recovered by claimants of a cargo which had been improperly sold by the master of the ship in consequence of a shipwreck, from the date of such sale, was upheld by the court. *The Richmond*, 4 Blatch., 84.

§ 88. The right to interest is wholly conventional in its origin. Where law and usage are

not found to sanction it, it cannot exist; as in case of a claim against the United States. *Todd v. United States*,\* Dev., 93, 175.

§ 89. When a *mandamus* is to credit a certain sum of money, it is a sufficient obedience to the writ to credit that sum without interest. *United States v. Kendall*, 5 Cr. C. C., 335.

§ 90. Interest must begin to run from the time a party asserts his claim to land. *Buchannon v. Upshaw*, 1 How., 56.

§ 91. In a judgment upon an attachment, interest cannot be added. *Power v. Semmes*, 1 Cr. C. C., 247.

§ 92. When the United States circuit court, carrying out the decree of the supreme court, adds interest in addition, it is error. *Boyce's Executors v. Grundy*, 9 Pet., 275.

§ 93. If the property ordered to be restored by the decree of a court has been sold, interest is not to be paid unless specially ordered by the decree. *Himely v. Rose*, 5 Cr., 313.

§ 94. Where a bond is given to the United States for the payment of a certain sum on a certain day in Amsterdam, payment after that day and the receipt of such payment will not destroy the right to interest on the money during the time the obligor was in default. *United States v. Gurney*, 4 Cr., 333.

§ 95. Where a defendant acted *bona fide* and was in no default, he was held not bound to pay interest on the assets in his hands, unless he had made interest thereon. *Grattan v. Appleton*, 3 Story, 755.

§ 96. The government.—The twelfth section of the act of congress of March 3, 1863, relating to suits against revenue officers, and afterwards by the act of July 28, 1866, extended to claims arising under the abandoned and captured property acts, enacts that where a recovery shall be had in any such suit, and the court shall certify that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the secretary of the treasury or other proper officer of the government, no execution shall issue against the collector or other officer, but the amount so recovered shall upon final judgment be provided for and paid out of the proper appropriation from the treasury. It is held that the claim of the plaintiff is not converted into a claim against the government until the certificate is given, and that therefore the government is not liable for interest before that time. That a writ of error has superseded execution on the judgment is not material since it does not suspend the power of the plaintiff to obtain the certificate. *United States v. Sherman*,\* 8 Otto, 565.

§ 97. Interest is in the nature of damages for withholding money which the party ought to pay, and would not or could not; but where the holder of a claim omits for a long space of time to make application for the payment, and the act of congress directing payment is silent as to interest, he does not come within the reason of the rule. *Interest on Claims*,\* 1 Op. Att'y Gen'l, 268.

§ 98. Interest ought not to be allowed on the sums assessed by the commissioner in favor of the Georgia claimants, it not having been stipulated in the case, and the United States never having agreed to become responsible to the claimants further than the Indians, whose place they have taken, were. *Interest on the Georgia Claims*,\* 1 Op. Att'y Gen'l, 554.

§ 99. The United States were bound to Virginia, by the relation which subsists between the general and state governments, to provide the means of carrying on the war; and failing to make such provision, and Virginia herself having made it from her own resources, the same became a debt against the United States, which they were bound to reimburse. The rule concerning interest has been, that where a state supplied the moneys for expenditure from her own treasury, no interest has been allowed; but where a state, from the condition of her own finances, was obliged to borrow the money, and to thus incur a debt on which she herself became obligated to pay interest, interest has been allowed to her for indemnity. In the case of Virginia, there is a special act authorizing the payment of interest, and prescribing the rules for computing it. Interest may be computed upon loans or money borrowed and actually expended for the use and benefit of the United States in the war of 1812, with Great Britain; but shall not be computed upon any sum Virginia has not expended for the use and benefit of the United States, as evidenced by the amount refunded; nor upon any sum upon which she has not paid interest; nor upon any sums refunded or paid her subsequent to such refunding or payment. It was the intention of congress to reimburse to the state of Virginia all the interest which she had actually paid on account of loans made necessary by her having taken the place of the United States in meeting the expenditures of the war in that state; and although the money so borrowed may have been placed in the state treasury, and thereby blended with the state revenue, yet if, from the revenues thus blended, a sum equal in amount to the sum borrowed were expended for the use of the United States, the state is nevertheless entitled to interest, without proof that the very dollars borrowed were expended. And also to interest on loans made necessary by the exhaustion of the state treasury in taking up loans for the use of the United States. *Payment of Interest to Virginia*,\* 1 Op. Att'y Gen'l, 723.

§ 100. Interest is not any part of a debt, nor a necessary consequence of a debt. By the polity of many nations it is forbidden; and by those whose laws allow it in any case, it is not made a right in all. In cases of unliquidated damages it is, in general, disallowed; and the Georgia claims, being of that character, are excluded by the general rule. In those claims, the debt having been adjusted on liberal principles, the property having been averaged above its value from 1783 to 1802, it would be prodigality, not justice, to add interest to such a valuation. Interest on the Georgia Claims,\* 1 Op. Att'y Gen'l, 554.

§ 101. There is no law inhibiting accounting officers from allowing interest to claimants, if it shall appear that interest is justly due them. Accounts and Accounting Officers,\* 2 Op. Att'y Gen'l, 463.

§ 102. Interest on a demand against the United States is properly allowable where the claimant, in a suit against him, obtained a judicial decision in his favor, and the act of congress providing for its payment proceeded upon the knowledge that interest had been allowed by the court. Interest on Demands against the United States,\* 3 Op. Att'y Gen'l, 294.

§ 103. Where the treasurer of the United States issued a draft upon a deposit bank to a navy agent, who sold it in order to raise money for necessary expenditures, and the draft was afterward presented and dishonored, *held*, that it was proper for the treasury department to pay the interest and costs incident to the dishonor, and the amount, from the original appropriation under which it was drawn. Payment of Interest and Costs of a Protested Draft,\* 3 Op. Att'y Gen'l, 320.

§ 104. Interest on claims for losses occasioned by troops in the service of the United States is not allowable, unless the same shall be expressly provided for in the act of congress under which the claim is authorized to be paid. Power of the Secretary of the Treasury Concerning Certain Claims,\* 3 Op. Att'y Gen'l, 635.

§ 105. A claimant is not entitled to interest as against the government on account of the omission of the executive officers to allow his claim when presented. Interest upon Private Claims,\* 4 Op. Att'y Gen'l, 14.

§ 106. The executive department has no authority, under the settled practice of the government, to allow interest on items omitted in the settlement of a claim from a mistaken view of the law. Interest on Items of Account, etc.,\* 4 Op. Att'y Gen'l, 136.

§ 107. The government has, in general, refused to pay interest in the absence of a special contract to that effect. *Ibid*.

§ 108. The executive department is not authorized to allow interest upon a draft drawn by the American *chargé d'affaires* to Peru upon the treasury, for his outfit, before the same had been appropriated by congress, because of the delay occurring in respect to its payment. Interest on a Draft for Outfit, etc.,\* 5 Op. Att'y Gen'l, 27.

§ 109. In general, the government, which is always to be presumed ready and willing to discharge its obligations, pays no interest; yet, from considerations of state policy, it has sometimes, as in the case of claims under the act of 1814, allowed it. Claim of Henry de la Francia,\* 5 Op. Att'y Gen'l, 105.

§ 110. Although interest as a general rule will not be paid upon claims against the government, there are instances in which the government, from consideration of policy, allows it. Claim of the Heirs of Thomas Ewel,\* 5 Op. Att'y Gen'l, 138.

§ 111. Interest on claims for transportation, under the act of June 2, 1848, should be allowed up to the time of payment at the treasury; provided the claimant presents his application without unnecessary delay. The act did not create debts bearing interest redeemable only at the pleasure of the creditor. Interest on Claims,\* 5 Op. Att'y Gen'l, 399.

§ 112. In the case of Hon. James Semple, *chargé d'affaires* to New Granada, who had drawn a draft for his salary which was dishonored at the banking house in London, and the holder subjected to delay thereby, and the drawer to the payment of interest, *decided*, that the government is liable for such interest, and that Mr. Semple is liable to account to the government for interest on the amount over and above his salary realized by him on the negotiation of such draft from the time he was notified of the mistake. Payment of Interest on Protested Draft,\* 4 Op. Att'y Gen'l, 299.

§ 113. Where certain lands were ceded by an Indian tribe to Great Britain in 1773, in trust for the payment of said tribe's debts, and the claimant, a creditor of said tribe, received a certificate of liquidation from the commissioners appointed for that purpose, and was subsequently breaking out, in which claimant sided with the colonies, and after the war a large tract of said lands being ceded to the United States, it was decided that the lands ceded in 1773 were charged with the debts, and that the claim was entitled to interest from the date of the certification of the commissioners liquidating the demand. Allowance of Interest on Claims,\* 5 Op. Att'y Gen'l, 227.

§ 114. Interest should be allowed the state of Florida upon all sums expended, and obligations contracted, for supplies and services of local troops called into service in 1849, by and

under the authorities of said state, where it shall appear that said state has paid, lost or incurred interest on that account. Interest on Florida Debt,\* 5 Op. Att'y Gen'l, 455.

§ 115. As a general rule the United States do not pay interest on any debts of the government. The only exceptions are where the government stipulates to pay interest, as in public loans, and where interest is given by the act of congress expressly, either by the name of interest or by that of damages. Payment of Interest by the United States,\* 7 Op. Att'y Gen'l, 523.

§ 116. Where a mail steamship company was bound by law, out of sums of money coming due to it from the government for mail service, to refund, with interest, certain advances made to the company, and, by reason of the failure of congress to make appropriations for the service, the government was in default to the company, *held*, that the latter was not bound to pay interest during the period of such default. Mail Steamer Contract,\* 7 Op. Att'y Gen'l, 535.

§ 117. The resolution of congress of June 3, 1784, that "an interest of six per cent. per annum should be allowed to all creditors of the United States for supplies furnished or services done, from the time that the payment became due," was a voluntary contract on the part of the United States, constituting a legal claim against them, from which no subsequent legislation could release them without the consent of the other party. *Baird v. United States*,\* Dev., 96, 182.

§ 118. Interest cannot be allowed against the government except "upon a contract expressly stipulating for the payment of interest." (Act of congress of March 3, 1863.) *Tillon v. United States*,\* 1 Ct. Cl., 220.

§ 119. A financial agent of the government was allowed to recover a sum to which he was entitled by reason of an error in his accounts which at the time was known to the accounting officers of the government, but without interest. *White v. United States*,\* Dev., 17.

§ 120. Interest is not a legal incident to a debt due from the United States, where it is simply proved that the debt is due. *White v. United States*,\* Dev., 93.

§ 121. Where interest is not stipulated for in a contract with the United States, and is not allowed by statute, it cannot be recovered though payment is unreasonably withheld. *Tillson v. United States*, 10 Otto, 43.

§ 122. The liability of the government for interest depends on statutory provisions therefor. No interest can be recovered against the government on judgments against collectors for customs illegally exacted. *White v. Arthur*, 10 Fed. R., 80.

§ 123. As a general rule the United States does not pay interest. The exceptions to this rule are found only in cases where the demands are made under special contracts or special laws expressly providing therefor. *Claim of Maryland*,\* 9 Op. Att'y Gen'l, 57.

§ 124. Where an act of congress authorizes the payment of money out of the treasury to a citizen, such act is to be strictly construed, and unless it authorizes the payment of interest, either in direct words or by clear implication, nothing can be paid but the principal. *De Groot's Claim*,\* 9 Op. Att'y Gen'l, 449.

§ 125. Under the act of congress of June 8, 1872, referring the claim of the heirs of Francis Vigo to the court of claims, and providing that in such settlement the court shall be governed by the rules and regulations heretofore adopted by the United States in like cases, it was held interest should be allowed on the claim, it appearing that the claim was similar to those upon which interest was allowed by act of congress of August 5, 1790. *United States v. McKee*, 1 Otto, 442.

§ 126. **Vendor and purchaser.**—In April, 1819, Potter purchased from E. Gardner a farm, two-thirds of which was charged by the will of P. Gardner with the payment of his debts. E. Gardner claimed under the will. At the time of the purchase it was agreed that Gardner should remain in possession of the farm until March 25, 1822, at a rent of \$900 per year, the consideration money to be paid when the lease expired. This rent was in lieu of interest on the purchase money, and to the same amount. If any part of the consideration should be paid before the lease expired, interest was to be allowed on the sum thus advanced. The creditors of P. Gardner, deceased, filed a bill against Potter to have the purchase money applied in payment of their debts. As Potter had already applied some of the purchase money in payment of debts due by E. Gardner, it was considered by the court that this was a misapplication, and that he should pay the same amount to the creditors of P. Gardner, if it could not be collected from E. Gardner, and also the balance that remained due of the two-thirds of the purchase money. It was held that he was not chargeable with interest on either of these sums prior to March 25, 1822, the time the purchase money was paid, but that he could not object to the payment of all interest on the ground that he had no power to discharge the obligation before final decree in the case, since he might have saved himself interest by paying into court the balance which he conceived to be due. Gardner having retained possession of the farm only two years under the lease, and then surrendered it to Potter, the latter alleged that he paid



the rent of the farm or the interest on the purchase money for the third year, and therefore claimed credit for two-thirds of this sum. But the court held that as interest was not charged against Potter until after the expiration of the lease, this sum, whether paid as interest or for rent, could not be credited as so much paid on the principal, or in discharge of interest which subsequently accrued. *Potter v. Gardner*,\* 5 Pet., 718.

§ 127. The purchaser of land cannot defend against the payment of interest on the purchase money on the ground that his possession has been unjustly or illegally interfered with either by the sovereign or the citizen or the public enemy. Thus, where a large tract of wild land in Florida which was inhabited by Indians who had ceded their title was sold and a mortgage taken back for payment of the purchase money, it was held that the purchaser could not defend against the payment of interest upon the ground that he had incurred trouble and expense in getting his title recognized by the government of the United States, although finally confirmed by the supreme court of the United States reversing the decision of the local courts holding it invalid. *Curtis v. Innerarity*,\* 6 How., 146.

§ 128. Where a large tract of wild and uncultivated lands occupied by Indians who had ceded their title was sold and a mortgage given back to secure the purchase money, the purchaser receiving full seizin and possession of the lands under a good and indefeasible title, subject to the transient occupancy of the Indians as hunting grounds, it was held that such occupancy, or any accidental disturbance of the possession by the Indians during Indian wars, could not operate as a defense to the payment of interest upon the purchase money. *Ibid*.

§ 129. The doctrine of the civil law that a vendee is not liable for interest where he has received no profits from the thing purchased applies only to executory contracts where the price is contracted to be paid at some future day, and the contract is silent as to interest. In such a case the civil law will allow interest from the date of the contract of sale if the vendee has received possession and profits. It differs in this respect from the common law, which would not allow interest before the day fixed for payment, unless specially contracted for. But where the purchaser has contracted to pay on a given day, and neglects or refuses to do so, both law and equity subject him to interest as the measure of damages for breach of the contract. *Ibid*.

§ 130. By the terms of a sale under a deed of trust the purchase money was to be paid in instalments, with interest from the day of sale, and the purchaser had the right to immediate possession. The purchaser did not take possession until some time after the sale, being engaged in the meantime in investigating the title. Upon motion to dissolve an injunction, procured by the purchaser to prevent a resale by the trustee, it was held that the purchaser was liable for interest on the purchase money from the time of the sale, notwithstanding his failure to take possession, and up to the time it was brought into court under the order of the judge granting the injunction, but not afterwards. *Markoe v. Coxe*,\* 5 Cr. C. C., 537.

§ 131. Whether the jury, in an action upon the covenant, should allow interest upon the value of the lands at the date of the contract, must depend upon the circumstances of the case, of which they are the proper judges, and it is competent for the defendant to give in evidence to the jury any circumstances tending to show that interest should not be allowed. *Letcher v. Woodson*, 1 Marsh., 212.

§ 132. Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must pay interest from the time the debt is liquidated until he makes a good title, and the vendee is accountable for the rents and profits from the time the title is perfected until the contract is specifically performed. *Hepburn v. Dunlop*, 1 Wheat., 179.

§ 133. Where the vendor under a land contract accepted the purchase price without claiming interest, and delivered the deed, he cannot afterwards claim interest though the money was withheld for some time. *Carpenter v. United States*, 17 Wall., 499.

§ 134. Where a purchaser has entered into possession of property and made valuable improvements thereon, the court will presume an acquiescence by the vendor, notwithstanding the purchase money has not been paid, and will decree a conveyance on payment of the money, but the purchaser will be required to pay interest up to the time the money was paid. *Mason v. Wallace*, 4 McL., 77.

§ 135. If the vendee refused to receive and pay for a title which the court decreed him to take, and the vendor tendered a conveyance on the day fixed by the contract of sale for the payment of the price and the delivery of the deed, and there were no rents and profits, the vendee must pay interest, though there was a doubtful point of law involved in the title which it was prudent to have settled, and the vendee acted in good faith. *Sohier v. Williams*, 2 Curt., 195.

§ 136. An open account does not draw interest; but when there has been a delay of payment in violation of the contract, the party failing should in justice be made to pay interest as a part of the damages assessed by the jury, though no statute provides for it. *Bispham v. Pollock*,\* 1 McL., 411.

§ 187. It seems that an account bears interest or not according to the general usage upon the subject, and that the jury may, considering such usage, allow interest or not as they deem proper. *Killingly v. Taylor*, \*1 Cr. C. C., 99.

§ 138. An account draws interest after liquidation, and is considered liquidated after it is rendered, if no objection is made. *Cooper v. Coates*, 21 Wall., 105.

§ 139. A sale of goods, without a term of credit given, is liquidated when contracted, and after the account is presented and impliedly admitted the defendants are in default and chargeable with interest. *Ibid.*

§ 140. Formerly the laws of Louisiana did not allow interest on accounts or unliquidated claims, but now it is due from the time the debtor is put in default for the payment of the principal. *Barrow v. Reab*, 9 How., 366.

§ 141. Coupons bear interest from the date they are payable, and the failure to present the coupons for payment at the place where they are payable does not prevent the running of interest unless the maker shows he had money to pay the coupons at the time and place of payment mentioned therein. *Walnut v. Wade*, 13 Otto, 683.

§ 142. Coupons are so far distinct contracts for the payment of money that when they become due they bear interest, and may be sued on separately from the bond. *Brine v. Insurance Co.*, 6 Otto, 627; *Town of Genoa v. Woodruff*, 2 Otto, 502.

§ 143. Where suit is brought upon a bond to which are attached unpaid interest coupons, interest is recoverable on such coupons from the time they become due and payable. *Rich v. Town of Seneca Falls*, 19 Blatch., 553.

§ 144. A coupon payable on presentation and demand can bear interest only from the date of its maturity, and after payment has been demanded and unjustly refused. *Corcoran v. Chesapeake & Ohio Canal Co.*, \*1 MacArth., 367.

§ 145. Interest coupons being negotiable instruments draw interest from the time payment is unjustly neglected and refused. *Aurora City v. West*, 7 Wall., 82.

§ 146. Damages.—Interest is not allowed on damages for breach of contract. In a suit on a note, where defendant set up damages, it was held that the damages must be assessed as of the day when the verdict was rendered, interest to be reckoned on the note to the day of the verdict. *Youqua v. Nixon*, \*Pet. C. C., 221.

§ 147. It is generally in the discretion of the jury to give interest in the name of damages; but interest ought not to be allowed on unliquidated and contested claims sounding in damages. *Willings v. Consequa*, Pet. C. C., 172; *Gilpins v. Consequa*, Pet. C. C., 85.

§ 148. When the damages are unliquidated, whether the form of action be tort or contract, the allowance of interest is within the discretion of the court or jury. Where delay after demand was granted by plaintiff at defendant's request interest was allowed from the time of the demand. *Oakes v. Richardson*, 2 Low., 173.

§ 149. Interest is not, as a general rule, recoverable on unliquidated damages, and was refused in a suit for infringement of a patent where the infringer had acted in good faith. *Mowry v. Whitney*, 14 Wall., 620.

§ 150. In an action in Maryland on a policy of insurance, where the damages were unliquidated and in dispute between the parties, it was held that under the laws of that state the jury could allow interest or not as they might deem just upon the evidence. *Hugg v. Augusta Insurance & Banking Co.*, Taney, 159.

§ 151. In patent cases.—The allowance of interest in addition to the damages awarded for the infringement of a patent was held to be erroneous. *Silsby v. Foote*, 20 How., 378.

§ 152. Interest was held properly chargeable on profits arising from the infringement of a patent. *Tatham v. Lowber*, 4 Blatch., 86.

§ 153. Profits arising from the infringement of a patent are the measure of unliquidated damages, and interest is not to be allowed thereon except under peculiar circumstances—where the conduct of the defendants is such that interest should be imposed. *Littlefield v. Perry*, 21 Wall., 205.

§ 154. Where no interest is stipulated.—In actions upon obligations for the payment of money containing no stipulation in regard to interest, it is not necessary to demand interest in the declaration or negative its payment. The interest is recovered as damages for the detention of the money. And this is so although the law denominates it interest, and fixes it at a certain rate per cent. But where the parties stipulate in the contract for the payment of interest before the debt falls due, the interest cannot be regarded in the light of damages, but constitutes part of the contract itself. The interest accrues by the stipulations of the parties, and is not a legal consequence of a breach of the contract. But the promise to pay the debt, and the promise to pay interest from the date of the contract, are two separate and distinct promises; and a declaration which demands the original debt and damages for its detention, without demanding the interest due by the contract itself, is not defective. Under such a dec-

laration the plaintiff cannot recover the interest accruing by the contract itself, but he may recover the debt, and interest from its maturity as damages for its detention. *Chinn v. Hamilton*,\* *Hemp*, 438.

§ 155. Where interest is to be paid on a loan in instalments and nothing is said about the payment of interest after the principal is due, the creditor is entitled to interest by operation of law and not by the terms of the contract. And under such a contract a state law giving interest on unpaid instalments of interest from the time they became due would have no application. *In re Bartenbach*,\* 11 N. B. R., 61.

§ 156. Interest, not being specially claimed, cannot be computed, for it is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. *Olney v. Steamship Falcon*, 17 How., 19.

§ 157. Seamen's wages.—In a claim for wages by the officers and sailors of a ship, it was held that they were entitled to interest on the amounts due from the period when a claim for the same from the assignees of the owners was made by a petition. *Sheppard v. Taylor*, 5 Pet., 675.

§ 158. In an action for seamen's wages, interest will, as a general rule, be allowed from the time the wages were due until a tender or payment under the decree of the court; but interest will be allowed only upon regular wages and not upon extra wages recovered by way of compensation for short allowance. *The Elizabeth Frith*, Bl. & How., 195.

§ 159. In suits for wages, interest is allowed from the time of a demand proved; and if no demand is proved, from the commencement of the suit. *Gammell v. Skinner*, 2 Gall., 45.

§ 160. Interest is allowed on liquidated demands in admiralty the same as at law, and on seamen's wages from the time they are due. *The Steamboat Swallow*, Olc., 334.

§ 161. Where a cargo of oil of a whaling ship has been sold and the proceeds embezzled by the master, the owners are liable to the seamen, and interest is to be allowed after sufficient time has elapsed for the arrival and sale of the oil and the adjustment of the voyage, and after demand made. *Jay v. Allen*, 1 Spr., 180.

§ 162. Interest on a claim for seamen's wages allowed only from the time of filing the libel. *Bates v. Seabury*, 1 Spr., 433.

§ 163. Commences to run, when.—If there has not been a previous demand of the penalty of a bond, or an acknowledgment that the whole is due, interest is recoverable only from the commencement of the suit. *Bank of the United States v. Magill*, 1 Paine, 681.

§ 164. Consignors brought *assumpsit* for proceeds of cargo which had been taken under legal process by the defendants, the consignees, for debts of prior owners of the ship. The court gave the plaintiffs interest from the time of the receipt of the money by the defendants, instead of from the time the same would have been received by plaintiffs if remitted in the ordinary course of business, considering it a case of illegal conversion by defendants. *Ricketson v. Wright*,\* 3 Sumn., 335.

§ 165. The defendant acted as the agent of the plaintiff in purchasing, and the plaintiff sued him for a balance remaining in his hands of money advanced for this purpose. The plaintiff claimed interest from a reasonable time after the last credit, but the jury were instructed to compute interest from the commencement of the suit, as no special demand had been made. *Williams v. Baxter*,\* 3 McL., 471.

§ 166. A promise was made by the defendant, the drawer of a protested bill of exchange, that if plaintiff would give time he would pay the bill when he should be able. In an action on the new promise the plaintiff is entitled only to the sum stated in the bill, and to interest from the time when defendant was able, and not to any damages. *Lonsdale v. Brown*, 4 Wash., 148.

§ 167. Where a conveyance is set aside for gross misrepresentation and deceit, the ground of the decision must be considered to have been fraud, and in such a case interest is to be paid on the money refunded, without reference to any demand, and from the time it was received, and interest on the interest from the time of its payment on any of the notes originally given. *Doggett v. Emerson*, 1 Woodb. & M., 196.

§ 168. Where a case heard on an agreed statement of facts was one of an appeal bond, it was proper for the court to give judgment for the penalty of the bond (being less than the judgment under the mandate), and allow interest from the date of the institution of the suit, although the amount to be paid in this way would exceed the penalty of the bond. *Ives v. Merchants' Bank of Boston*, 12 How., 159.

§ 169. By the laws of Illinois a party guilty of unreasonable and vexatious delay in making payment of a just claim cannot be relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious. If he is guilty of such delay he is chargeable with interest on the debt from the time it became due. *Chicago v. Tebbetts*, 14 Otto, 120.

§ 170. In ordinary cases, where the relation of mortgagor and mortgagee is uncontroverted,

if a mortgagee receive the rents of a mortgaged estate, after his debt has been satisfied, and retain them to his own use, without paying them over to the mortgagor, he is chargeable with interest. But if there are sufficient equitable circumstances in favor of the mortgagee, as if he retained the rents under a mistake, supposing the rights of the mortgagor extinguished, he would not be liable for interest until after notice of the adverse claim. *Gordon v. Lewis*, 2 Sumn., 143.

§ 171. No interest is due on a promissory note payable at a future day with interest at a certain rate, until the principal sum is due, unless a special agreement to the contrary is inserted. *Tanner v. Dundee Land Investment Co.*, 12 Fed. R., 646.

§ 172. Bank bills do not draw interest till there has been a demand and a refusal of payment, notwithstanding a suspension of specie payment and the filing of a petition in bankruptcy by the bank. But a proof of such bills against such bankrupt bank is equivalent to a presentation and demand, and interest is to be allowed from that time. *In re Bank of North Carolina*, 2 Hughes, 369.

§ 173. War interest being held inequitable in Virginia, the district court, as a court of equity, may require creditors of a bankrupt to abate such interest when embraced in judgments obtained by default, and this regardless of the statutory provision of 1873. *Fowler v. Dillon*, 1 Hughes, 236.

§ 174. War interest disallowed in this case. *In re Carter*,\* 2 Hughes, 447.

§ 175. From a period long anterior to the adoption of the national constitution, the general assembly of Virginia having reserved to itself the power of intrusting the allowance of interest, even the rate permitted to be taken by law, to the discretion of the jury, this express reservation of power has entered into every contract that has been made between her citizens, and the act of the general assembly of 1872, allowing the abatement of interest which accrued during the civil war, does not impair the obligation of contracts. *Harmanson v. Wilson*, 1 Hughes, 207.

§ 176. If an alien enemy has an agent in the United States, and this is known to the debtor, interest ought not to abate during a war. *Denniston v. Imbrie*, 3 Wash., 396.

§ 177. B. of New York owed W. of Virginia \$13,000 on a bond given for the purchase of land in Virginia, which was due in May, 1861. In a suit thereon after the war it was held that interest should not be computed on the sum due during the time when intercourse between the states named was suspended by the war, or from April 19, 1861, to May 26, 1865. *Bigler v. Waller*, Chase's Dec., 316.

§ 178. A citizen of Mississippi in a suit brought against him by a citizen of Kentucky, on a debt due before the war, is not entitled to an abatement of interest during the war by reason thereof. *Rogers v. Arthur*,\* 2 Am. L. Rev., 188.

§ 179. In an action on a bill of exchange drawn in Memphis in 1861, and payable in Baltimore, it was held that no interest could be recovered for the time between the president's proclamation of August 16, 1861, declaring the existence of war, and that of June 13, 1865, announcing its close. *Jackson Ins. Co. v. Stewart*,\* 6 Am. L. Reg., 732.

§ 180. Interest is recoverable on a note due from a citizen of North Carolina to a citizen of Pennsylvania during the time when intercourse between those states was suspended by the war of the rebellion and the act of July 13, 1861. *Shortridge v. Macon*, 1 Abb., 58; 2 Am. L. Rev., 95.

§ 181. A disallowance of interest during the time of the civil war approved. *In re Carter*, 2 Hughes, 447.

§ 182. Interest on debts due by citizens of the United States to the subjects of the king of Great Britain ceased during the revolutionary war and the war of 1812; but the mere circumstance of war existing between two countries is not a sufficient reason for abating interest upon the debts due by the subjects of one belligerent to the subjects of another. A prohibition of all intercourse with an enemy during war furnishes a just reason for the abatement of interest on debts due to the subjects of the belligerent until the return of peace. But this rule does not apply when the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent residing there who is authorized to receive the debt. *Conn v. Penn*, Pet. C. C., 496.

§ 183. A debt payable by a citizen of Arkansas to a citizen of Oregon did not bear interest while the former state was in insurrection against the United States. *Chappelle v. Olney*, 1 Saw., 401.

§ 184. Whether or not the rule that interest is not recoverable on debts between alien enemies during war between their respective countries is applicable to debts between citizens of the states in rebellion and citizens of states adhering to the government during the civil war, the rule does not apply where the debt is not to be paid to the belligerent directly but to his agent residing within the same lines as the debtor. *Ward v. Smith*, 7 Wall., 447.

§ 185. The running of interest on a note given by a citizen of Kansas to a citizen of Virginia was suspended by the civil war though a certain rate of interest was stipulated in the note. *Brown v. Hiatts*, 15 Wall., 177.

§ 186. **Executors and administrators.**—The orphans' court has jurisdiction to charge an administrator in his account with interest in certain cases, like a court of equity. *Union Bank v. Smith*, 4 Cr. C. C., 509. And see *Pulliam v. Pulliam*, 10 Fed. R., 53.

§ 186a. If an administrator mingle the assets with his own funds, he is presumed to have applied them to his own use, and is chargeable with interest for the whole time they were so mingled. *Ibid.*

§ 186b. Executors and administrators are not charged with interest on assets in their hands unless special circumstances warrant imposing the penalty, such as using the assets for one's own purposes, or putting the funds out on interest, or being guilty of fraudulent misconduct, or unconscientiously retaining the assets from the heirs or other persons entitled thereto. *Dexter v. Arnold*, 3 Mason, 284; *Cassels v. Vernon*, 5 Mason, 332.

§ 187. Where an administrator retains money in his hands until the right of the claimant to the same can be determined by a suit, he is not liable for interest. *Wade v. Wade*,\* 1 Wash., 477.

§ 188. In a suit in equity against an executor and trustee for an account, where it appears that he acted in good faith in the execution of his trust, but misapprehended his duty in the particulars in respect to which he is charged in the final decree, he will, where a balance is found by a master's report to be due from him, be charged with interest only from the date of the report on the sum found due. *Norman v. Storer*, 1 Blatch., 593.

§ 189. Where an executor is, upon principle, liable for interest, he will be charged from the time he should have paid the money, from its receipt, or from the date of conversion, according to the circumstances, but will sometimes be excused where the other side is in fault, until demand made or bill filed. If, however, he is, on principle, not chargeable with interest, it will not be reckoned against him until, by a decree confirming the report, his accounts have been settled and the amount he is to pay ascertained. *Pulliam v. Pulliam*, 10 Fed. R., 53.

§ 190. Where an executor is chargeable with sums of which he has had no personal benefit, but which he has lost by paying a claim barred by a special statute of limitations, or by the depreciation of property unreasonably withheld from sale, he will not be chargeable with interest thereon. *Ibid.*

§ 191. Except in special cases an administrator is not chargeable with interest upon assets in his hands. *Dexter v. Arnold*, 3 Mason, 284.

§ 192. An executor was held not to be excused from paying interest by showing that he had invested the fund in Confederate bonds from which he received no interest, such investment being held not to discharge the principal. *Lockhart v. Horn*, 3 Woods, 542.

§ 193. Where an executor, contrary to his trust, borrows trust funds in his hands, he is chargeable with the highest rate of interest allowed under the law. *McKenzie v. Anderson*, 2 Woods, 357.

§ 194. **Legacies.**—In the absence of any provision by will to the contrary, a pecuniary legacy is due one year after testator's death, and bears interest thereafter. The cases of infant children not otherwise provided for, and of adopted children under age, not otherwise provided for, are exceptions to the general rule. *Sullivan v. Winthrop*, 1 Sumn., 1.

§ 195. Where the executors invested certain sums, less than the whole amount of the legacy, in the name of the legatee, held, that this was a payment of the legacy *pro tanto*, and that the interest accruing upon these sums, within the year from the time of such investment, belonged to the legatee. *Ibid.*

§ 196. Specific legacies bear interest from the date of the testator's death. *Pulliam v. Pulliam*, 10 Fed. R., 53.

§ 197. **Officers.**—Where an officer of the government has money committed to his charge, with the duty of disbursing or paying it out as occasion may require, he cannot be charged with interest on such money until it is shown that he has failed to pay when such occasion required him to do so, or has failed to account when required by the government, or to pay over or transfer the money on some lawful order. The mere proof that the money was received by him raises no obligation to pay interest in the absence of some evidence of conversion, or some refusal to respond to a lawful requirement. Thus in a suit against a surety upon the bond of a paymaster in the navy, where there was no evidence of any demand on the paymaster, or any refusal to pay or transfer the funds in his hands, or to comply with any lawful order on the subject, it was held that the government could not claim interest from the date of the last receipt of money by the paymaster. *United States v. Denvir*,\* 16 Otto, 536.

§ 198. The provisions of the act of March 3, 1797, requiring the payment of interest by receivers of public money, was intended to apply to wilful defaulters, and not to one acting in good faith and declining to pay a large sum greatly reduced by the officers of the treasury on

subsequent restatements on the same evidence, where there is finally paid all which is due, and more, before suit is instituted. *United States v. Collier*, 8 Blatch., 325.

§ 199. A United States marshal is entitled to interest on all sums due to him and not paid after demand, but on the same principle must pay interest on what is due from himself after demand. *United States v. Smith*, 1 Woodb. & M., 184.

§ 200. Interest is not chargeable on money collected by the marshal of the District of Columbia for fines due to the levy court, the money having been actually expended by the marshal in repairs and improvements on the jail, under the opinions of the comptroller and auditor of the treasury department that these expenditures were properly chargeable upon this fund, although that opinion may not be well founded. *Levy Court v. Ringgold*, 5 Pet., 451.

§ 201. Usage and custom.—Where it was the custom in the place to sell merchandise on a credit of six months, and charge interest on the account after that time, the court instructed the jury that if they were satisfied that such was the custom, they might presume, if the facts warranted it, that the purchaser had notice of the custom, and might in their discretion allow interest on the account after the six months. *Bispham v. Pollock*, \*1 McL., 411.

§ 202. In a suit on a note executed at Canton, which said nothing about interest, the court heard evidence on the custom in such cases at Canton. *Cowqua v. Lauderbrun*, \*1 Wash., 521.

§ 203. It is the usage at Canton to add interest on the amount of the articles sold, and for which compensation is demanded, to the other charges. *Consequa v. Willings*, Pet. C. C., 301.

§ 204. Claims due the government.—The defendant had a special contract with the government to furnish supplies to the army and received advances of money. In 1808 his account was settled at the treasury and a balance of \$2,200 found to be due from him. In 1812 he claimed other credits which had not been allowed in 1808, and which the treasury officers held him entitled to, reducing the balance against him to \$1,616. *Held*, that the United States were entitled to interest on the \$1,616 from 1808, and could not be affected by the subsequent allowance of a credit not known nor perhaps proved when the first settlement was made. *United States v. Ormsby*, \*3 Wash., 195.

§ 205. Sureties on official bonds, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as accrued from their own default in unjustly withholding payment after being notified of the default of the principal. *United States v. Hills*, 4 Cliff., 618.

§ 206. A trustee who is directed by the deed of trust to sell the property and invest the proceeds in productive funds, and fails to do it, is liable to pay interest. *Nicholson v. McQuire*, 4 Cr. C. C., 196.

§ 207. Interest will not be allowed against a trustee holding a fund when he has made no interest, if there be no laches or neglect, or use of the money on his part. *Cassels v. Vernon*, 5 Mason, 332.

§ 208. Guardians.—Under the laws of Mississippi a guardian who uses the ward's property as his own, but who neglects to file account or inventory for some years, is liable for interest on the amounts received; and where such property was appropriated before the war of the rebellion, interest should be allowed during that time. *Bourne v. Maybin*, 3 Woods, 740.

§ 209. On affirmation.—The supreme court alone, in cases of affirmation of decrees, can award interest as damages, and if no interest is there allowed, it is a denial of it. *Boyce's Executors v. Grundy*, 9 Pet., 289.

§ 210. The rule that in admiralty cases which are appealed to the supreme court, interest is not allowed on affirmation of the decree unless specifically so directed by the supreme court has no application where the decree is reversed. *The Grapeshot*, 2 Woods, 42.

§ 211. In admiralty appeals the supreme court never allow interest as such. When in the opinion of the court interest should be allowed, it is included in the decree in a gross sum. *Ibid*.

§ 212. Partial payments having been made by the sureties on a bond on which a judgment had been recovered, the application of these payments was made by deducting them from the penalty of the bond, and allowing interest on the balance thus resulting, from the commencement of the suit, there having been no previous demand of the penalty, or acknowledgment that the whole was due. But interest was refused to the sureties on the payments. *McGill v. Bank of the United States*, 12 Wheat., 511.

§ 213. Where payment is prevented.—Interest is allowed upon the ground that the debtor is in default, and has the use of the claimant's money. It is never allowed when by order of a court of competent jurisdiction, or by interposition of law or the act of a creditor, payment of the debt has been prevented. During the continuance of such prevention the interest does not run. Thus where a creditor having a first lien on a fund, and who was prevented from collecting his debt by an order of court requiring the fund to be paid into court, asked for the allowance of interest during the time the fund was in the possession of the court, the court said it knew of no principle of law or equity upon which the interest claimed could be allowed at the

expense of the general unsecured creditors, who were in no wise responsible for the delay in making the final order of distribution. *Bowman v. Wilson*,\* 2 McC., 394.

§ 214. **Compound interest.**—Although interest as such cannot bear interest, yet the parties may agree that it shall, either at the time the contract is made or after it has become due. Whenever the creditor has a right to demand it, he may waive that right and lend it to the debtor as so much due. And in running accounts the parties may agree to settle their accounts at stated periods, strike a balance and convert interest into principal. This is not opposed to the statute of usury. If this may be done by an express agreement, it may be done by an implied one. *Barclay v. Kennedy*,\* 3 Wash., 350.

§ 215. **Interpleader.**—Where the plaintiff to a bill of interpleader fails to bring the money into court, he must pay interest on it. *Spring v. South Carolina Insurance Co.*, 8 Wheat., 268.

§ 216. **Treasury notes** issued under the act of congress of 1814, chapter 77 and chapter 699, are on their face payable in one year, with interest up to the day when due, but if not then paid by the government the interest does not stop, but continues until paid, and may be required by the holder in the same manner as interest might be claimed on a private contract of a like nature. *Thorndike v. United States*, 2 Mason, 1.

§ 217. **Interest on treasury notes** issued under the act of congress of October 12, 1836, and placed in the hands of disbursing officers to meet public liabilities, does not begin to accrue until they are actually issued by such officers. *Interest on Treasury Notes*,\* 3 Op. Att'y Gen'l, 296.

§ 218. **The decree in bottomry** is to consider the sum lent and the premium as a principal, and to allow common interest on that sum for the delay of payment after it is due. *The Ship Packet*, 3 Mason, 235.

§ 219. **Pleading.**—In an action upon a money demand, interest from the commencement of the suit follows as a matter of law and need not be demanded in the petition. *Whitaker v. Pope*,\* 2 Woods, 468.

§ 220. **Money received to use of another.**—The Oregon code provides "that the rate of interest in this state shall be ten per centum per annum, and no more, on all moneys, after the same become due, on judgments and decrees for the payment of money, on money received to the use of another and retained beyond a reasonable time without the owner's consent express or implied." Plaintiff brought an action against defendant to recover certain sums of money alleged to have been received by the defendant from the treasury of the United States to the plaintiff's use. *Held*, that the case fell within the latter clause of this section of the code, and the contract sued on was an interest-bearing one. *Dowell v. Griswold*,\* 5 Saw., 23.

§ 221. **Interest may be given as damages** for the non-payment of money received by the defendant to the plaintiff's use, after demand and refusal. *Grammer v. Carroll*, 4 Cr. C. C., 400.

§ 222. **Use of money restrained.**—Where a defendant is restrained by an injunction from using money in his possession, interest will not be decreed against him. *Osborn v. Bank of the United States*, 9 Wheat., 738.

§ 223. **After a general decree of restitution** in the United States supreme court, the claimants or original owners cannot set up a claim for interest upon the stipulation taken in the usual form, for the appraised value of the goods, interest not being mentioned in the stipulation itself. Nor can interest be decreed against the captors personally, by way of damages for detention and delay, no such claim having been set up on the original hearing in the court below, or upon the original appeal to the supreme court. *The Santa Maria*, 10 Wheat., 431.

§ 224. **Conversion of property.**—A jury, in the exercise of their discretion, may give interest on the value of property converted, as a part of the damages. *Matthews v. Menedger*, 2 McL., 145.

§ 225. **Rent is not due until demanded**, and interest will not run until after demand. *Wise v. Ressler*,\* 2 Cr. C. C., 199.

§ 226. **In an action of covenant for rent**, the landlord cannot recover interest. *Gill v. Patton*, 1 Cr. C. C., 188.

§ 227. **Interest may be recovered upon ground rents in arrears**, and in Pennsylvania the landlord is entitled to recover interest from the time the rent is due though demand was not actually made, if an agent of the landlord was at the place of payment ready to receive them and the tenant was notified of that fact. *Newman v. Keffer*,\* 33 Pa. St., 442.

§ 228. **When a national bank suspends payment** and a receiver is appointed, a depositor is entitled to interest on his deposit from the time of demand, and if such interest is not paid, interest will be allowed on it from the time when it should have been paid. *National Bank of the Commonwealth v. Mechanics' National Bank*, 4 Otto, 437; S. C., 15 Alb. L. J., 849.

§ 229. **In bankruptcy.**—Creditors who have proved their claims against the estate of the bankrupt are entitled to interest up to the time of payment, if the fund is sufficient. *In re Hagan*, 6 Ben., 407.

§ 230. **Where the assets of a bankrupt bank have paid in full all the debts proved against**

it, and there remains a surplus in the hands of the assignee, a creditor who has proved a debt on the circulating bills of the bank is entitled to interest thereon only from the time of filing the bills in proof before the register, no previous or other demand having been made for payment of the bills. *In re Bank of North Carolina*, 2 Hughes, 369.

§ 231. Where a creditor prevails in a claim honestly and fairly disputed by assignees in bankruptcy, he is not entitled to interest on the dividend upon such debt from the time like dividends were declared on acknowledged or undisputed debts. *Hersey v. Fosdick*, 20 Fed. R., 44.

§ 232. Interest accruing after an adjudication in bankruptcy is not provable against the bankrupt's estate. On secured claims, however, the creditor may apply the security to the payment both of principal and interest if it is so stipulated in the contract. *In re Haake*, 2 Saw., 231.

§ 233. Costs and interest may be proved in bankruptcy as a part of a judgment debt. *Ex parte O'Neil*, 1 Low., 163.

§ 234. Forfeitures.—Where property seized as forfeited to the United States is delivered to the claimant, he is liable for interest on its appraised value from the date of the decree of condemnation. *One Hundred and Ninety-nine Barrels of Whisky v. United States*, 4 Otto, 86.

§ 235. An assignee is chargeable with interest on money of the estate employed in the business of a firm of which the assignee is a member. *In re Cook*, 17 Fed. R., 323.

§ 236. The ninth section of the bankruptcy act of 1841 requires the assignee to pay into the registry all assets received in money, within sixty days after they come into his hands. *In re Thorp*, Dav., 290; 4 N. Y. Leg. Obs., 377.

§ 237. If he does not do so within this time, he is chargeable with interest, during the time they are retained by him thereafter, on the sum to be distributed, after deducting the charges of administration. *Ibid.*

§ 238. Bottomry bond.—The absence of a stipulation for interest in a bottomry bond does not preclude the allowance of interest from the time of a judicial demand therefor by the institution of a suit, nor does the fact that the parties have had no use of the money, but that it has lain for some time in the registry of the court, affect the matter. *The Grapeshot*, 2 Woods, 42.

§ 239. The Union Pacific Railroad Company was not required, under the act of congress of July 1, 1862, and the act of July 2, 1864, amendatory thereof, to pay interest on the principal of the bonds issued by the United States to it until the maturity thereof. *United States v. Union Pacific Railroad Co.*, 1 Otto, 72.

§ 240. Where an illegal tax has been collected the person who has paid it and been obliged to bring suit against the collector is entitled to interest in the event of recovery from the time of the illegal exaction. *Erskine v. Van Arsdale*, 15 Wall., 75.

### III. RATE AND COMPUTATION.

SUMMARY.—*After maturity of note*, § 241.—*Computed to first day of term*, § 242.—*Judgments and decrees upon affirmance in supreme court*, § 243.

§ 241. It is the rule of the supreme court of the United States, where the rule of local law is not different, to give, where a note is silent as to the rate of interest after maturity, interest at the contract rate up to the maturity of the contract, and thereafter the rate prescribed by law for cases where the parties themselves have fixed no rate. *Holden v. Trust Company*, § 244.

§ 242. For many purposes the term of court is regarded as but one day, and in all actions sounding in contract interest is computed to the first day of the term only, so that it is entirely proper that judgments and verdicts should draw interest from the first day of the term. But in an action of tort, where the jury have not been directed to compute the amount which they should find due as of the first day of the term, the judgment should be for the amount of the verdict with interest from the day of its rendition. *Gibson v. Cincinnati Enquirer*, § 245.

§ 243. By the sixty-second rule of the supreme court of the United States, adopted in 1851, superseding and annulling rules 18 and 20, judgments at common law and decrees in chancery, upon affirmance in the supreme court, carry interest until paid; and the interest is to be calculated according to the rate of interest allowed in the state in which the judgment or decree of the court below was given. Cases in admiralty, however, are not embraced in the sixty-second rule. No rule fixing any certain rate of interest upon decrees in admiralty, when the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved to add to the damages awarded by the court below further damages by way of interest,



in cases where, in the opinion of the court, the appellee, upon the proofs, is justly entitled to such additional damages. Where the decree of the admiralty court below is affirmed by the supreme court from necessity, by an equal division among the justices, interest on the decree cannot be allowed. *Hemmenway v. Fisher*, § 246.

[NOTES.—See §§ 249-283.]

### HOLDEN v. TRUST COMPANY.

(10 Otto, 72-74. 1879.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This record presents no ground for controversy as to the facts, and only one legal point that requires consideration. But for the importance of that point as a matter of local law we should dispose of the case without a formal opinion. On the 13th of October, 1870, at the city of Washington, Charles H. Holden, the appellant, made his promissory note of that date to John B. Wheeler, or order, for \$5,000, payable four years from date at the Bank of Washington, with interest at the rate of ten per cent., payable semi-annually. On the same day he executed to David L. Eaton a deed of trust of certain property in the city of Washington, to secure the payment of the principal and interest of the note as they should respectively fall due. On the 19th of October, 1870, Wheeler indorsed and delivered the note to the appellee, Talbot, who paid him at the time, as the consideration of the transfer, the sum of \$5,000. Talbot thereupon became a *bona fide* holder of the instrument. On the 28th of July, 1873, he executed to his co-appellee—the Savings and Trust Company—his promissory note for \$1,500, payable at ninety days, and pledged the note of Holden as collateral security. Talbot's note is still unpaid. The interest on Holden's note was paid up to the 13th of April, 1873, and \$75 on account of interest was paid subsequently. The principal and the residue of the interest are unpaid. Eaton, the trustee in the deed of trust, died on the 13th of February, 1873. On the 30th of September, 1871, Holden conveyed the trust premises to John Chester, one of the defendants. This bill was filed on the 18th of November, 1874. It prayed that a trustee should be appointed in place of Eaton; that the successor so appointed should be directed to execute the trust; and for general relief. The court below found, among other things, that Holden was indebted to Talbot on the note in the sum of \$5,000, "with interest thereon at the rate of ten per cent. per annum from the 13th of April, 1873, less the sum of \$75," and that the Savings and Trust Company had a lien on the debt for \$1,500, and interest from April 13, 1875. It was decreed that a new trustee should be, and he was thereby, appointed, and that in default of payment of the amount due from Holden, and the costs, the trustee should proceed to sell the premises described in the deed of trust, etc. From this decree Holden appealed to this court.

The note of Holden, including days of grace, matured on the 16th of October, 1874. Up to that time there can be no doubt that the rate of interest to be paid was that called for by the note. But what is the rate chargeable thereafter? The court below allowed continuously the rate expressed in the note. Was this correct? This is the question we are called upon to decide.

§ 244. *The contract rate of interest will be given to the maturity of the note and the general legal rate thereafter.*

The subject of interest in its historical aspect was considered by this court in *National Bank of the Commonwealth v. Mechanics' National Bank*, 94 U.

S., 437 (BANKS, NAT., §§ 144-47). The statutory provisions relating to interest in the District of Columbia are as follows: 1. The rate of six per cent. per annum is allowed upon all moneys due, where there is no contract upon the subject. 2. Parties may stipulate in writing for ten per cent. per annum, or any less rate. 3. If more than ten per cent. is taken upon any contract, all the interest received may be recovered back, if it be sued for within a year.

The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. *Brewster v. Wakefield*, 22 How., 118; *Bernhisel v. Firman*, 22 Wall., 170. Where a different rule has been established, it governs, of course, in that locality. The question is always one of local law. This subject was fully examined in the recent case in this court of *Cromwell v. County of Sac*, 94 U. S., 351. We need not go over the same ground again.

Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to everything beyond that it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intentment cannot be inferred. The analogies relied upon to support a different view are obviously distinguishable from the case in hand. The decree will be altered according to these views.

It appears that since this appeal was taken, Thomas J. D. Fuller, Esq., the trustee appointed in place of Eaton, has also died. Another trustee in his stead will be appointed here. As modified in these two particulars, the decree will be affirmed and remitted to the court below for execution; and it is so ordered.

#### GIBSON v. CINCINNATI ENQUIRER.

(Circuit Court for Ohio: 2 Flippin, 88-92. 1877.)

Opinion by SWING, J.

STATEMENT OF FACTS.—The plaintiff brought his action for libel against the defendant, and on the 16th day of November, 1876, the jury rendered a verdict in his favor for the sum of \$3,875. On the 17th day of November, 1876, the defendant filed a motion for a new trial. This motion was argued by counsel, and submitted to the court at the February term, 1877, and on the 15th day of October the court overruled the motion for a new trial, and ordered judgment to be entered upon the verdict for the amount thereof, with interest from the 3d day of October, 1876, being the first day of the term at which the verdict was rendered. See 5 Cent. L. J., 380, for a report of the opinion on that motion. On the 17th day of October, 1877, the defendant filed a motion to modify the judgment, for the reason that no interest should have been allowed upon the verdict until judgment was entered thereon.

It is insisted by the defendant that interest is the creature of the statute, and that this case does not come within its provisions; that the cause of action was not founded upon contract, but was an action for a tort, and that in such cases interest is only recoverable from the date of the judgment.

§ 245. *In an action for damages for a tort, interest is allowed from the rendition of the verdict, if the judgment be delayed by a motion for a new trial.*

I think the supreme court of Ohio in *Haag v. Zanesville Canal Co.*, 5 Ohio, 416, settled the doctrine that interest may be allowed as well in actions of tort as in those upon contracts. In that case it is said that a jury may calculate interest upon the amount of damage actually sustained, and add it to their verdict. If the jury in fixing the amount due from the defendant to plaintiff may give to him interest, certainly the law should give him interest upon the sum which they have returned in his favor, from the date of their verdict. And the supreme court of Virginia, in *Lewis v. Arnold*, 13 Gratt., 464, hold that in regard to interest upon the verdict there is no difference, in principle, between verdicts in actions for torts and upon contracts.

Upon the question of the right of the plaintiff to interest upon the verdict, I can see no difference between a verdict in an action for tort and a verdict in actions sounding in contract—the verdict in either case fixed the amount due at the time of its rendition, and that amount the party is entitled to have paid him as of that date,—and if the payment is delayed him by the act of the defendant, he ought to have interest. Such has been the practice of this court, and such seems to be the current of authority.

In *Sprant v. Cutter*, Wright, 157, interest was allowed upon an award from its date, and the court say: “And if it were the verdict of a jury, and judgment had been delayed, we should allow interest if asked.” By the statute of Maine in relation to occupying claimants, it is provided that the court shall render for *the sum estimated by the jury*; but the supreme court of the state, in *Winthrop v. Curtis*, 4 Greenl., 297, held that the party was entitled to interest from the date of the verdict. The statute of New Hampshire, as ours, allows interest upon judgments without distinction as to the nature of the action in which the judgment is rendered; and the supreme court of that state, in *Johnston v. Atlantic & St. Lawrence R. R. Co.*, 43 N. H., 410, say: “No solid reason can be given for withholding interest between the finding of the jury and the rendering of the judgment,” but inasmuch as the court below had refused interest, and no exception had been taken to the ruling, the writ of review was dismissed. The rule of the supreme court of Connecticut in relation to motion for new trials is, in substance, that where execution is stayed by reason of reserving a cause on motion for new trial, if judgment be not reversed, interest shall be added to the judgment from the time of the stay. 18 Conn., 575. In *Weed v. Weed*, 25 Conn., 494, a verdict was rendered in favor of the plaintiff for \$745.85. A motion for a new trial was made by the defendant. Some time afterward the court granted the motion unless plaintiff would remit \$117. Plaintiff remitted and the court rendered judgment upon the verdict for the balance, including interest from the date of the verdict. The case was taken to the supreme court and the judgment was affirmed. In *Bull v. Ketchum*, 2 Denio, 188, the court recognize the doctrine that at common law the plaintiff was entitled to interest on the verdict where delay of the entry of the judgment was occasioned by the defendant. The same doctrine is held in *Vredenberg v. Hallett & Bowne*, 1 Johns. Cas., 27; *People v. Gaines*, 1 Johns., 343; *Lord v. Mayor of N. Y.*, 3 Hill, 430. In *Rheims v. Robbins*, 20 Ia., 41, the court held that the interest should have been computed upon the verdict from the time when judgment should have been rendered, thus recognizing the right to interest before judgment. In *Renther v. The State*, 3 Ind., 86, the court say that judgment upon an award may properly include interest from the date of the

award to the date of the judgment. In *Buchanan v. Davis*, 28 Penn. St., 211, the award was filed May 17, 1856, judgment was rendered upon it at the December term, 1856, and execution issued for judgment with interest from date of filing the award. The court say: "The award made pursuant to the submission would, like a verdict, draw interest from the date of filing its entry, and is therefore no objection to the *fi. fa.*"

I am aware that a different doctrine was announced by that court in *Felsey v. Murphy*, 30 Penn. St., 340, but Judge Strong, in delivering the opinion of the court in the subsequent case of *Irvin et al. v. Hazelton*, 37 Penn. St., 465, reviews the decision of the court in *Felsey v. Murphy*, and says that it decides nothing more than that "a judgment entered generally operated from the day of its entry, so as to carry interest only from that time," and holds in the case before the court that there was not error in the court below in entering judgment with interest from the date of the verdict.

In North Carolina, in *Devereux v. Burgwin*, 11 Ired., 491, it was held that interest was not allowable on an award; and in Louisiana, in *Burner v. Copley*, 15 La. Ann., 504, it was held that, in actions for damages, interest could not be allowed either upon verdicts or judgments. But these cases are certainly against the weight of authority; and I think, both upon principle and authority, that whenever judgment upon the verdict has been delayed by the action of the defendant, the plaintiff is entitled to interest from the date of the verdict.

The judgment, however, in this case is wrong in this: that it is for interest from the first day of the term, when it should have been only from the day of the rendition of the verdict. It is true that for many purposes the term is regarded as but one day, and in all actions sounding in contract, interest in this court is computed to the first day of the term only, so that it is entirely proper that the verdicts and the judgments should draw interest from the first day of the term. But in actions of tort, such as the present, where the jury were not directed to compute the amount which they should find in favor of the plaintiff as of the first day of the term, the judgment should have been for the amount of the verdict with interest from the date of its rendition. The judgment will be modified in accordance with this opinion.

#### HEMMENWAY v. FISHER.

(20 Howard, 255-260. 1857.)

#### Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case was decided at the last term. It was an appeal from the decree of the circuit court for the district of Massachusetts, sitting as a court of admiralty. The decree was affirmed here by an equal division of the justices of this court; and the decree of affirmance was entered by the clerk for the sum awarded by the circuit court and costs, and did not give interest on the amount decreed by the court below. The mandate was issued according to the decree; but it was not filed or proceeded on by the appellee, because he supposed that, under the eighteenth rule of this court, he was entitled to interest on the amount recovered in the circuit court, from the date of the decree, and that its omission was a clerical error. And he has now moved the court to correct it by amending the decree and mandate.

If an error has been committed by the clerk, it is, without doubt, in the power of the court to correct it at the present term. But the judgment is

correctly entered, and the mandate conforms to it. And the mistake on the part of the appellee has arisen from supposing the eighteenth rule to be still in force, and to be applicable to cases in admiralty. But it never applied to admiralty cases. It will be observed by reference to the seventeenth rule, to which the eighteenth refers, that these rules are in express terms confined to cases brought here by writ of error. And it is true that, by the original judiciary act of 1789, decrees in chancery and admiralty, as well as judgments at common law, in the circuit courts, were removable to this court by writ of error, and were not made removable in any other manner. And if that provision in the act of 1789 was still in force, and the rule unrepealed, the appellee would be entitled to the interest he claims, to be calculated under the twentieth rule, to the day of the affirmance of the decree.

§ 246. *Judgments at law are reviewed by writ of error, decrees in equity or admiralty by appeal.*

But the writ of error, from its form, and the principles which govern it, is peculiarly appropriate to judgments at common law, and is inconvenient and embarrassing when used as process to remove decrees in chancery and admiralty to a superior court. The ordinary and uniform mode of removing such decrees to the appellate and revising court, wherever such jurisdictions have been established, has been by *appeal*, with the single exception of this act of congress. And, in order to remove the inconvenience and embarrassment which this provision in the act of 1789 created, it was repealed by the act of March 2, 1803, and the ordinary mode of *appeal* substituted in the place of the *writ of error*. And as this case came up by appeal, the rules of this court referred to in the argument do not apply to it.

Nor indeed were they intended to apply to chancery or admiralty decrees. They were adopted at the February term, 1853, and that term continued until the 2d of March. It was on that day that the act of congress changing the provision in the act of 1789 was approved by the president. And it appears by the minutes of the court that the rules in question were adopted on the same day, that is, March 2d. This act of congress had therefore, undoubtedly, passed both houses of congress before these rules were adopted, and it is evident that they were carefully framed with reference to this change in the law, so as to exclude from their operation admiralty and chancery appeals.

§ 247. *Judgments at law and decrees in chancery on affirmance carry interest at rate allowed in state where rendered.*

It may be proper to add, that the eighteenth and twentieth rules are no longer in force, even in common law cases. They have been superseded and annulled by the sixty-second rule, adopted in 1851. By this last mentioned rule, judgments at common law and decrees in chancery, upon affirmance in this court, carry interest until paid; and the interest is to be calculated according to the rate of interest allowed in the state in which the judgment or decree of the court below was given. The object in changing the rule in this respect was to place the suitors in the courts of the United States upon the same footing with the suitors in the state courts in like cases. For the interest allowed in the several states differs; and in many of them it is higher than six per cent., and in most, if not all, of them a judgment or decree in a court of the state carries interest until it is paid.

§ 248. *Decrees in admiralty on affirmance do not carry interest unless allowed by decree of affirmance.*

Cases in admiralty, however, are not embraced in the sixty-second rule. It

applies to cases of law and equity only. And, indeed, cases in admiralty could not have been justly included. For there could be no reason for giving one rate of interest where a case of collision or salvage was in the first instance tried and decided in Louisiana, and another rate of interest where it was tried and decided in New York, or in any other state where the interest allowed by the state laws was different. Moreover, in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates, and the opinions of persons acquainted with the subject; and, acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.

And it will sometimes happen in an admiralty case that this court will think that the damages estimated and allowed in the circuit court are too high, and yet the opinion here may approximate so nearly to that of the court below that this court would not feel justified in reversing its judgment. Besides, new testimony may be taken here, in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved, to add to the damages awarded by the court below, further damages by way of interest, in cases where, in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court. If given by this court it must be in the exercise of its discretionary power, and, *pro tanto*, is a new judgment.

In the case before us, no new judgment could be given in this court, because, upon the question of affirming or reversing the decree of the circuit court, the justices of this court were equally divided; and the judgment was affirmed by operation of law, which from necessity affirms the judgment of the inferior tribunal when the judges of the appellate court are equally divided. Upon such an affirmance, the appellee was entitled to the full benefit of the decree of the circuit court, but nothing more. The court, being equally divided, could not change the decree of the circuit court, nor exercise its discretionary power to allow interest on the decree; for this would have been a new decree. And those justices who were of the opinion that the decree of the circuit court ought to be reversed because the damages were too high, were of course opposed to making it still higher by the addition of interest.

The motion to amend the decree and mandate, and give interest on the amount awarded by the circuit court, must therefore be overruled.

§ 249. After maturity.—The rate of interest agreed upon by the parties continues after maturity until the debt is paid or merged in a judgment. *Burgess v. Southbridge Savings Bank*, 2 Fed. R., 500.

§ 250. The law of Wisconsin having provided that any rate of interest not exceeding twelve per cent. might be agreed upon by the parties, and that where no rate was specified the interest should be seven per cent., it was held that where a bond was payable on a certain day with interest thereon at the rate of ten per cent. per annum, it drew that rate till due, and seven per cent. thereafter. *Hunneman v. City of Milwaukee*,\* 3 Am. L. J., 419.

§ 251. In an action on ten per cent. interest-bearing coupon bonds made in Iowa, it was held that interest would be allowed on the principal at the specified rate both after maturity and after judgment, but that on the coupons only six per cent. interest should be allowed after maturity and after judgment. *Cromwell v. County of Sac*, 6 Otto, 51.

§ 252. Under the laws of Illinois where a stipulated legal rate of interest is contracted for,

the debt bears that rate of interest so long as any part of the principal remains unpaid. *Ohio v. Frank*, 13 Otto, 697.

§ 253. Under the laws of Minnesota providing that any rate of interest may be agreed upon, and that if no rate is agreed upon, then the rate shall be seven per cent., it was held that where a note was payable at a certain time with interest at a certain rate, it would only draw legal interest after it was due if the note did not specify the rate to be drawn after due. *Brewster v. Wakefield*, 22 How., 118.

§ 254. In Massachusetts where a rate of interest is agreed upon by the parties, such rate continues until payment or judgment. *Burgess v. Southbridge Savings Bank*, 2 Fed. R., 500.

§ 255. Where a debt is payable at a certain time at a certain rate of interest higher than the rate specified by statute where no rate is stipulated for, such debt draws interest at the stipulated rate till maturity, and thereafter at the legal rate. *Burnhisel v. Firman*, 23 Wall., 170.

§ 256. Where a note bears interest at a certain rate until maturity, interest will be reckoned thereon at the same rate after maturity if there is no agreement in terms controlling it. *Brewster v. Wakefield*, \* 1 Minn., 352.

§ 257. Where interest was reckoned on a note after maturity at the rate which it was stipulated it should draw before, and which was higher than the rate fixed by law where no agreement was made, and a new note was given for the amount of the principal and interest as thus computed, it was held that such note was, under the laws of Utah, valid as to the amount of the principal with interest up to maturity at the agreed rate, and after maturity at the legal rate. *Burnhisel v. Firman*, 23 Wall., 170.

§ 258. Accounts regularly stated and balanced, and the interest added to the balance, received by the debtor, and acquiesced in without objection, may fairly be considered by the jury as evidence of an agreement that interest is to be so calculated. And in like manner a well established usage of trade sanctioning such a mode of stating the account may have the effect of an agreement. Such usage, however, should be fully proved and should appear to be sufficiently ancient and uniform to be known to all persons in the particular trade. *Barclay v. Kennedy*, \* 3 Wash., 350.

§ 259. A usage to add interest at the end of the year to the annual account, and interest on the balance, does not apply in a case in which the commercial intercourse between the two countries, in which the parties reside, had ceased when the account was transmitted. *Deniston v. Imbrie*, 3 Wash., 396.

§ 260. Interest begins to run at once on an account stated; and where the local law of the place where the transaction takes place does not provide at what rate interest shall be computed in such cases, yet a reasonable rate must be allowed, and one conforming to the custom obtaining in the community in which the transaction took place. *Young v. Godbe*, 15 Wall., 562.

§ 261. Where plaintiff states an account, unfavorable to himself in the computation of interest, he ought to be bound by it. *Smith v. Shaw*, \* 2 Wash., 167.

§ 262. *Lex loci*.—The rate of interest and the rules for its computation must be determined by the law of the place where the contract is to be performed. *Bainbridge v. Wilcocks*, 1 Bald., 536 (§§ 63-68).

§ 263. *Guardians*.—In New York a guardian whose investments are rejected by his ward is chargeable with interest at one per cent. less than the current legal rate during the time of his guardianship, with annual rests. If the rate is reduced by law after the termination of the guardianship, but before the accounting, he is chargeable with one per cent. less than the first rate, with annual rests till the end of the guardianship. From the termination of the guardianship the ward is entitled to interest at the first rate till it is changed and afterwards at the reduced rate. *Micou v. Lamar*, 7 Fed. R., 180.

§ 264. A garnishee having used the money held by him under garnishment process, his executor must pay interest from the time when the attachment process was served, to the time of the death of the garnishee, that amount only being claimed by the bill. *Mattingly v. Boyd*, 2 How., 128.

§ 265. *Exchange* should be computed at the rate prevailing at the date of the trial, and not at the par of exchange. *Smith v. Shaw*, \* 2 Wash., 168.

§ 266. *Executors and administrators*.—Annual rests are hardly sustainable in charging an administrator with interest, where there has been an honest administration, unless it be shown that the amount so ascertained was received by him. But, under a law allowing a conventional rate not exceeding ten per cent., a charge by the court below of eight per cent., with annual rests, was sustained under the circumstances of this case, where the administrator was shown to have mixed the funds with his own and to have used them for purposes of private speculation; where the assets for which he was held accountable were almost exclusively notes due the intestate, bearing ten per cent. interest and collected by the administrator; where, in his settlement with the county court, he had rendered no account of the interest received on

these notes, nor any interest account for the use of the money after it came into his hands, nor of the profits made by him by its use in his own business transactions; where he had made private arrangements to settle separately with the distributees, or to buy out their interests, which arrangements were accompanied with fraud and without any fair statement of the condition of the estate; and where he had kept no separate account of the trust funds in his hands. *Hook v. Payne*, 14 Wall., 252.

§ 267. **Coupons.**— Under the law of Wisconsin as it existed in 1857, unpaid interest coupons bore interest from the time they were due at seven per cent. interest. *Burton v. Town of Koshkonong*, 4 Fed. R., 373.

§ 268. **Partial payments.**— The proper mode of charging interest is to deduct the payments from the interest; and if any surplus remains, to apply it to diminish the principal. This is upon the principle that interest is incapable of producing interest, being no part of the debt; and that if the creditor does not apply the payment the debtor may. *Barclay v. Kennedy*,\* 3 Wash., 350.

§ 269. The rule for calculating interest in case of partial payments applies where interest is allowed as damages. *Smith v. Shaw*,\* 2 Wash., 167.

§ 270. The correct rule as to interest is, that the creditor shall calculate interest whenever a payment is made. To this extent the payment is first to be applied, and if it exceed the interest due, the balance is to be applied to diminish the principal. This rule is equally applicable whether the debt be one which expressly draws interest, or on which interest is given as damages. *Story v. Livingstone*, 13 Pet., 359.

§ 271. The correct mode of casting interest when partial payments have been made is to apply the payment in the first place to the discharge of the interest then due, and if the payment exceeds the interest the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of the principal unpaid. If the payment be less than the interest the surplus interest must not be taken to augment the principal, but interest continues on the principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal, and the interest is to be computed on the balance of the principal as above stated. *Russell v. Lucas*,\* Hemp., 91.

§ 272. The rule for settling interest accounts is, in case the payment is equal to, or exceeds, the interest, to add interest to the principal up to the time of the payment, and deduct the payment from the sum of interest and principal; but if the payment does not equal or exceed the interest, the payment is not to be deducted till the time of settlement. *Dunlop v. Alexander*, 1 Cr. C. C., 498.

§ 273. If trustees in a deed of trust to secure a debt, being required to sell for cash, allow time on a part of the purchase money at a lower rate of interest than that borne by the original debt, the creditor, in the absence of any evidence of novation or assent on his part, is entitled to interest at the rate of the original debt until paid, notwithstanding. *In re Carter*,\* 2 Hughes, 447.

§ 274. Where the trustees neglected to invest the trust funds (the amount of them not being large), they ought not to have been charged upon the principle of six months rests and compound interest. *Barney v. Saunders*, 16 How., 535.

§ 275. On a note payable on demand, with ten per cent. interest until paid, the interest is to be computed from date, that being clearly the intention of the parties. *Pate v. Gray*, Hemp., 155.

§ 276. **Nevada.**— Though, under the laws of Nevada, a greater rate of interest than ten per cent. could not be recovered by action unless the promise to pay that sum was in writing, yet parties may by agreement verbally fix a higher rate, and when charged, in stating an account between the parties, the balance of the account thus stated may still be recovered. *Marye v. Strouse*, 6 Saw., 204.

§ 277. **Where, in a collision case in admiralty, damages are allowed as for a total loss, interest should be allowed thereon at the rate of six and not at the rate of seven per cent.** *The Mary Eveline*, 14 Blatch., 497.

§ 278. When congress authorizes the payment of a debt with interest, this, without more, means that legal interest shall be paid on the whole of the principal for all the time during which the principal has been unpaid. *Claim of Maryland*,\* 9 Op. Att'y Gen'l, 57.

§ 279. A person cannot recover special damages for the detention of money due to him beyond what the law allows as interest. *Insurance Co. v. Piaggio*, 16 Wall., 378.

§ 280. National banks under the national banking law are entitled to charge the same rates as may be charged by banks of issue under the laws of the state in which they are located, and more, if natural persons, under such laws, are allowed to charge more. *Tiffany v. National Bank of Missouri*, 18 Wall., 409.



§ 281. *Miscellaneous.*—Where interest was allowed the personal estate of a deceased for sums advanced by it in discharge of specialty debts, it was held that in accordance both with the general course of the court, and with the justice of this particular case, such interest should be limited to twenty years. *Byrd v. Byrd's Executor*, 2 Marsh., 169.

§ 282. The interest on the claim of the representatives of George Fisher, deceased, for property taken or destroyed by the troops of the United States, should be computed from the time of the taking or destruction, and should be allowed at the rate of six per cent. for the period of the detention. Interest on the Claim of Representatives of Geo. Fisher,\* 5 Op. Att'y Gen'l, 71.

§ 283. A., the principal, residing in Europe, directs his agent, B., in Virginia, by letter bearing date December 20, 1787, to convert the funds in his hands belonging to the principal into certificates, which B. fails to do. In the spring of 1789 B. determines to relinquish his agency, and places A.'s funds in the hands of C., except a certain amount which is not accounted for. C. invests the funds of A. in certificates, according to his previous directions. *Held*, that B. is chargeable with certificates which he ought to have purchased, with the balance remaining in his hands, at the same rate that other certificates were purchased by C. in 1789. But B. is accountable for the certificates with their legal interest only, and not with the certificates into which the interest might annually have been converted. *Short v. Skipwith*, 1 Marsh., 103.

#### IV. LEX LOCI.

§ 284. *In general.*—The interest to be allowed in an action against a person who promised to accept a bill, and who has failed to do so, is the interest of the place where the promise was made and where it was to be performed, and not of the place where the bill was drawn. *Boyce v. Edwards*, 4 Pet., 123.

§ 285. Interest on a bill of exchange is allowable at the rate charged where the contract is to be executed. Thus, where bills were drawn in Georgia on parties in Charleston, South Carolina, with a view to the state of South Carolina for the execution of the contract, the rate of interest allowed in the latter state was chargeable. *Ibid*.

§ 286. A promissory note was executed and made payable in New York, but indorsed for the accommodation of the maker in Rhode Island and there negotiated. *Held*, that the rate of interest was governed by the laws of Rhode Island. *Providence County Savings Bank v. Frost*,\* 13 N. B. R., 356.

§ 287. Where general authority is given to draw bills of exchange from a certain place on account of advances there made, the legal interest of that place is chargeable. *Lanusse v. Barker*, 3 Wheat., 101.

§ 288. In the several states of the Union the rate of interest is regulated by law, and therefore any other species of evidence than the law itself is inadmissible to prove the rate of interest. It is otherwise as to foreign countries where the rate of interest is regulated by custom. *Jaffray v. Dennis*,\* 2 Wash., 253.

§ 289. In a suit in Pennsylvania upon an account contracted and settled in Georgia, the legal rate of interest according to the law of Georgia was allowed. *Ibid*.

§ 290. The defendant being indebted to the plaintiff in a certain sum of British sterling gave his bond for the amount in sterling generally, to be paid in Ireland, with a power of attorney to confess judgment in some court of Ireland. The debt is to be considered due in British sterling, but to carry Irish interest where it is payable. *Bushby v. Camac*, 4 Wash., 296.

§ 291. In deciding questions of interest the federal courts follow the local law. *Holden v. Trust Company*, 10 Otto, 72 (§ 244).

§ 292. Interest will not be allowed in the United States courts before judgment when none is allowed by the law of the place where the contract is made. *Courtois v. Carpenter*, 1 Wash., 376.

§ 293. The law of the state from which a railroad company derives its authority to execute instruments for the payment of money governs the rate of interest which may be recovered thereon. *Codman v. Vermont & Canada R. R. Co.*, 16 Blatch., 165.

§ 294. Where a debt is payable at a certain time and place, the rate of interest is to be regulated by the laws of the place where it is payable. *Hus v. Kempf*, 10 Ben., 364.

§ 295. Where the rate of interest at the place of contract differs from the rate at the place of payment the parties may contract for either rate, and the contract will govern. *Cromwell v. County of Sac*, 6 Otto, 51.

§ 296. Where a contract is silent as to the rate of interest, and is in terms made payable in another state, the implication of the law is that the parties contemplated that the laws of the other state as to the rate of interest should apply. *Rogers v. Lee County*, 1 Dill., 530.

§ 297. When no rate of interest is fixed by the contract, and no place is designated for its performance, the interest is governed by the *lex fori*. *Goddard v. Foster*, 17 Wall., 123.

B. USURY.

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| I. IN GENERAL, §§ 298-417.                | IV. ASSIGNEES AND INDORSEES, §§ 518-535. |
| II. ATTEMPT TO EVADE THE LAW, §§ 418-487. | V. EFFECT OF USURY, §§ 536-566.          |
| III. LAW OF THE PLACE, §§ 488-517.        | VI. RELIEF AGAINST USURY, §§ 567-612.    |

I. IN GENERAL.

**SUMMARY** — *Determined by law in force at the time, § 298. — Mortgage; semi-annual interest; extension; application of excess, § 299. — Must be strictly proved, § 300. — Evidence under non-assumpsit, § 301. — Question of law, § 302. — Interest anterior to date of note, §§ 303, 307. — Exchange, § 304. — New security, § 305. — Change of securities, § 306. — Corporations, § 308. — Discount, §§ 309-311.*

§ 298. Whether a contract is usurious must be determined by the law in force at the time of its execution; and a subsequent statute allowing a rate before unlawful will not legalize payments of interest usurious under a prior law. *Latrobe v. Hulbert*, §§ 312-14.

§ 299. In 1863 C. borrowed of complainant \$25,000, for a period of five years, at eight per cent. interest, payable semi-annually. A note was given for the principal sum, and for the interest ten notes of \$1,000 each, payable every six months thereafter. The notes were secured by mortgage upon real estate. These ten interest notes were all paid, and at the end of the five years the loan was extended for another five years, and interest notes given as upon the original loan. Shortly after this C. died, and it was again extended by his executors upon the same terms for one or two years. In 1875 the executors sold part of the property covered by the mortgage, and afterwards, in the same year, an agreement was made by which the complainant, upon payment of the interest due and one-half of the principal, released the mortgage upon the property sold. But this release was not made upon the consideration of a settlement and adjustment of the excess of interest before and at the time paid. By the state law at the time of the original loan more than six per cent. could not be legally contracted for, and all payments of interest beyond that rate were to be taken as payments made on account of the principal. In 1869 the legal rate was changed to eight per cent. The executors claimed that the excess above six per cent. should be credited upon the principal. It was held (1) that there was nothing in the agreement of 1875 which gave it the legal effect of estopping the defendants from setting up the usury, and the remaining property covered by complainant's mortgage not being injured by that released, and being amply sufficient for the payment of the balance due, equity did not require that it should be so construed; (2) that as the first extension was made before the act of 1869 was passed, that contract was usurious, and the subsequent payments of interest were made under and in discharge of a usurious contract and were not legalized by that act; (3) that aside from this the rate of interest which was paid was greater than eight per cent. upon the amount which was legally due at the time of its payment, and this latter view applied to the payment of any interest by the executors after the expiration of the time of the first extension; and (4) that all payments of interest involved usury, and the excess above six per cent. should be applied upon the principal debt. *Ibid.*

§ 300. Usury is a defense that must be strictly proved, and the court will not presume a state of facts to sustain the defense where the instrument is consistent with correct dealing. *Ewing v. Howard*, §§ 315-17.

§ 301. Evidence of usury may be given under the plea of *non-assumpsit*. *Andrews v. Pond*, §§ 318-27.

§ 302. The court has the exclusive power of deciding whether a written contract is usurious. *Walker v. Bank of Washington*, §§ 328-29.

§ 303. Under a law making six per cent. the legal rate of interest in the absence of any agreement, but permitting parties to contract for a rate not exceeding ten per cent., provided the agreement to that effect is expressed in the face of the contract, and allowing such loans to be renewed for the same rate of interest, a note bearing ten per cent. interest from a day anterior to its date is not usurious upon its face. Such a note may have been given for the purchase of goods, chattels or lands, and in such a case it is not usurious unless the day described in the contract from which to compute interest was anterior to the actual day of the transaction and transfer of the subject-matter of purchase and sale. Such a note is open to explanation between the original parties; and it is presumed to have been given upon a state of facts which authorized it. *Ewing v. Howard*, §§ 315-17.

§ 304. If, in the giving of a bill of exchange in settlement of a pre-existing debt, a higher rate of exchange than the fair market price is allowed, and this is done in consideration of the

forbearance of payment, it will not change the character of the transaction that the parties are under a mistaken belief that the law will not in that shape regard it as usury. *Andrews v. Pond*, §§ 318-27.

§ 305. If, in consideration of further forbearance, the creditor receives a new security from his debtor for an existing debt, he cannot enlarge the amount due by exacting anything either by way of interest or exchange, on account of the additional risk he may run by this extension of credit, nor on account of any doubts he may have as to the punctuality of payment or the ultimate safety of his debt. *Ibid.*

§ 306. The mere change of securities for the same usurious loan to the same party who received the usury, or to a party having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious is void, however remote or often renewed. *Walker v. Bank of Washington*, §§ 328-29.

§ 307. W. applied to a bank for a loan, agreeing to give certain security. He drew a note for the amount and handed it to the bank on the 6th of February, but the note was not discounted by the bank nor the proceeds passed to his credit for some days afterwards and until the promised security was furnished. But W. had in the meantime drawn checks upon the bank. It seems to have been held that the transaction was not usurious because interest was calculated on the loan from the 6th of February instead of from the time the proceeds of the note were carried to his credit. *Ibid.*

§ 308. The statute of Virginia declaring that "no person" shall upon any contract take more than a specified rate of interest applies to corporations as well as to natural persons. *Bank of Alexandria v. Mandeville*, §§ 330-33.

§ 309. In a clear mercantile discount, the taking in advance by way of discount the whole interest, upon the whole sum, for the whole time the bill has to run, is not within either the English statute of usury, or that of Virginia, which is substantially a copy of it. And where the paper offered for discount at a bank bears the form and appearance of a mercantile negotiation, it is sufficient to enable the bank to recover upon the instrument discounted. The burden of proving the contrary is upon the other party. *Ibid.*

§ 310. The bank of Alexandria was allowed by its charter "to receive for discounts made at said bank at a rate not exceeding six per cent. per annum." And six per cent. was also the highest rate allowed by general law of the state. The bank discounted a note for \$800 for sixty days with three days of grace, and retained \$8.40 as the discount therefor. Held, that the transaction was clear of the statute of usury and within the charter. *Ibid.*

§ 311. Whether a certain sum for the discount of a note of a certain amount is at a certain rate per cent. is a question of fact for the jury. And it is for them to say what is the usual mode of calculation in such cases, and to calculate accordingly. *Ibid.*

[NOTES.— See §§ 334-417.]

#### LATROBE v. HULBERT.

(Circuit Court for Ohio: 6 Federal Reporter, 209-214. 1881.)

#### Opinion by SWING, J.

STATEMENT OF FACTS.—From the pleadings and evidence in this case it appears that on the 10th day of April, 1863, John W. Coleman borrowed of the complainant, John H. B. Latrobe, the sum of \$25,000 for a period of five years, at eight per cent. interest, to be paid semi-annually; that on that day he executed and delivered to the complainant his promissory note for \$25,000, payable on the 1st day of May, 1868, and also his ten promissory notes of \$1,000, payable every six months thereafter, being for the interest on the note of \$25,000, at the rate of eight per cent., payable semi-annually, and that to secure the payment of said notes John W. Coleman and Lucinda A. Coleman, his wife, executed and delivered to the complainant the mortgage in the bill described, upon real estate therein described, situate in the city of Cincinnati; that on the 1st day of July, 1866, the complainant, to accommodate Coleman, released said mortgage as to a part of the premises therein described. It further appears that each of said ten notes of \$1,000 each was paid to complainant by John W. Coleman. It is also stated that, at the request of said Coleman and his executors, the time for the payment of said principal sum was ex-

tended from time to time until the 1st day of August, 1875. From the evidence in the case it appears that, at the expiration of the first five years for which the loan was made, the time for its payment was extended by an agreement between the complainant and John W. Coleman for another period of five years, he giving his notes for the interest as upon the original loan; that after that it was extended by agreement between complainant and the executors for a period of one or two years on the same terms. Upon these points, however, the testimony is not quite clear. It further appears from the evidence that John W. Coleman died in November, A. D. 1868, but whether he paid the first instalment of interest under the extension is not clearly shown. The complainant thinks the notes were given by the executors and paid by them, but I think the weight of the evidence would seem to show that, although the interest was paid by the executors, the notes were given by John W. Coleman. From the evidence it further appears that the property under mortgage was under leases which expired 1st of May, 1875. Prior to this time the executors had taken steps to sell the property, and on the 14th day of June, 1875, a considerable portion of the property was sold. On the 19th day of June, 1875, it seems from a correspondence between the parties a negotiation commenced in regard to the release by the complainant of his mortgage upon a part or all of the premises mortgaged, upon his receiving a certain portion of his debt, and notes of the purchasers of the property for the balance. The correspondence upon this question embraced several propositions, but finally ending in an agreement between the parties that complainant, upon the payment to him of \$12,500 of the principal of his debt and of the interest due, would release his mortgage so far as it related to the property sold. This agreement was consummated on the 1st day of August, 1875, when complainant received from the executors the sum of \$15,000,—\$2,500 of which was the interest due at that date, and \$12,500 upon the principal debt,—and released the mortgage upon the portion of the property which had been sold, amounting to \$18,627.03. Some correspondence passed between the parties after this date, but nothing seems to have been done in regard to the balance of the claim until the bringing of this suit.

Upon the filing of the bill, the defendants answer, in substance admitting the execution of the note and mortgage as alleged in the bill, but alleging that there had been paid upon it up to August 1, 1875, eight per cent. interest, when by law complainant was entitled to but six per cent.; that they are entitled to have the two per cent. credited upon the principal, which reduces the amount due complainants to \$4,198.58, with interest from 1st of August, 1875.

§ 312. *Interest in Ohio in 1863 to 1869. Rule as to illegal interest in that state.*

By the statutes of Ohio at the time of the execution of the note and mortgage in this case, to wit, on the 10th day of April, 1863, six per cent. was the legal rate of interest, nor could the parties make a legal contract for interest beyond that rate; and all payments of interest made beyond that rate were to be taken as payments made on account of the principal, and the courts were forbidden to render judgment for a greater sum than the balance due after deducting the excess of interest so paid. By the act of May, 1869, it was provided that "the parties to a bond, bill, promissory note, or other instrument of writing, for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent. per annum, payable annu-

ally." This act took effect and was in force on and after the 1st day of October, 1869. Prior to the taking effect of this act, therefore, the parties could not legally contract for and receive a greater rate of interest than six per cent. Having contracted for and received eight per cent., the excess of two per cent. must be deemed and taken as payment made upon the principal, unless the parties by their subsequent acts have deprived themselves of or have waived the right to insist upon such application of the excess so paid. And it is claimed by the complainants that the agreement and arrangement of the 1st of August, 1875, had this effect; that by this contract there was a full and complete settlement of all interest which had been paid, and an ascertainment of the amount due up to that date, and the payment thereof and a payment of the sum of \$12,500 of the principal debt, upon the consideration that complainant would release a portion of his security, and that was done; and that this was the making of a new contract, which shuts out and precludes the defense of usury which before that time had existed. The defendants insist that the agreement and arrangement of the 1st of August did not have the effect claimed for it by the complainant, and, if it should be held by the court to have such an effect, that the executors had no authority in law to make it.

This leads us to inquire into the nature and character of the transaction of August 1, 1875. Was it a settlement and payment of the excessive interest which before that time had been paid and agreed to be paid? And was the release of a portion of the mortgage premises made in consideration of such settlement and payment?

§ 313. *Circumstances under which a debtor is not estopped from setting up usury as a defense to a suit on his debt.*

I have looked through the testimony carefully, and I think I may safely say that prior to that date no question had arisen between the parties as to whether the rate of interest paid or agreed to be paid was legal or in excess of that allowed by the law. It had not been discussed, and certainly such a question was not discussed upon that day. The only question had been and was, as to the amount of the proceeds of the sale the complainant should receive upon his releasing the property sold,—the complainant desiring to receive the full amount of the proceeds of the sale, and the executors desiring to retain an amount for costs and expenses; and the parties finally agreed that the complainant, upon receiving \$2,500, the interest then due, and \$12,500 upon the principal, should release the property sold. Nothing was said then or during the entire negotiation that the release was in consideration of a settlement and adjustment of the illegal interest which had been paid or was then being paid. I think, therefore, as a question of fact, that the release was not made upon the consideration of a settlement and adjustment of the excess of interest before and at the time paid.

This being so, there is nothing in the agreement itself which gives it the legal effect of estopping the defendants from setting up the usury in this case; and the remaining property covered by complainant's mortgage, not being injured by that released, and being amply sufficient for the payment of the balance due complainant, equity does not require that it should be so construed.

§ 314. *A contract is governed by the law in force when it is made, not by that in force when it is to be enforced.*

It is claimed, however, by complainant's counsel that, admitting the arrangement of August, 1875, did not estop the defendants from setting up usury, that

as to all payments of interest subsequent to the 1st day of October, 1869, they cannot be held to be usurious; for, by the law then in force, parties were authorized to contract for the payment of eight per cent. interest, and, having paid what they might have contracted for, such payments are not usurious.

If my view of the testimony be correct, that the contract for the extension of five years was made with John W. Coleman, it was made before the law of 1869 was passed, and the contract itself was usurious. The subsequent payments of interest were therefore payments under and in discharge of a contract which was, under the law when entered into, an usurious contract. The law of 1869 did not legalize usurious contracts; it only permitted parties after its passage to make contracts which before that time were usurious; and it is a well-settled principle of law that whether a contract is usurious must be determined by the law in force at the time of its execution. In both the case of *Samyn v. Phillips*, 15 Ohio St., 218, and that of *Mueller v. McGregor*, 28 Ohio St., 265, the original contracts under which the interest was paid were under the ten per cent. law, and the payment of the interest subsequent to the time limited by the contracts was a payment of that which, if the original contract had continued, would have been the legal rate of interest. I think, therefore, that the doctrine of these cases cannot apply to the present case, and that the payment of eight per cent. was in fulfillment of a contract usurious when made, and must be held to continue so even after the passage of the act of 1869.

But, aside from this, the rate of interest which was paid was greater than eight per cent. upon the amount which was legally due at the time of its payment; and this latter view applies to any interest paid by the executors after the expiration of the term of five years extended by the agreement of J. W. Coleman. These views render unnecessary any examination of the question as to the power of the executors under this will.

It follows, from the conclusions arrived at, that all payments of interest involved usury, and that the excess above six per cent. must be applied as payments upon the principal debt, and a decree entered for the payment of the balance found due.

#### EWING v. HOWARD.

(7 Wallace, 499-506. 1868.)

ERROR to U. S. Circuit Court, Middle District of Tennessee.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Judgment in this case was for the plaintiff in the court below, and the defendants in that court sued out a writ of error and removed the cause into this court. The action was *assumpsit*, and the cause of action was the two promissory notes set forth in the bill of exceptions. Plea was the general issue, and the bill of exceptions shows that the plaintiff, to maintain the issue on his part, introduced in evidence the two promissory notes on which the suit was founded. They were introduced without objection, and the bill of exceptions states to the effect that there was no other evidence introduced by either party. Defendants moved for a new trial, and also in arrest of judgment, but the court overruled both motions, and the defendants excepted to the rulings of the court.

§ 315. *Practice in the supreme court.*

Settled rule of the court is that a motion for a new trial is addressed to the

discretion of the court, and that the ruling of the court in granting or denying such a motion is not the proper subject of exceptions. *Henderson v. Moore*, 5 Cranch, 11; *Blunt v. Smith*, 7 Wheat., 248. Motions in arrest of judgment present questions of law when they are so framed as to call in question the sufficiency of an indictment or of a declaration in a civil suit; but the transcript does not contain the motion, and the declaration appears to be in due form and sufficient to sustain the judgment.

Defects of form in the writ or declaration, not pointed out by demurrer, are not in general regarded in this court as good cause for reversing a judgment brought here by writ of error, as the federal courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and conditions as the rules of the court prescribe. 1 Stat at Large, 91; *Stockton v. Bishop*, 4 How., 155; *Railroad v. Lindsay*, 4 Wall., 650.

Neither of the objections taken to the action of the circuit court and embodied in the bill of exceptions is urged in this court, and being in themselves entirely untenable, they must be considered as having been abandoned. Nothing else remains to be considered in the case except what arises from the form and tenor of the notes, which are set forth at large in the bill of exceptions, but without any comment or any objection being made to the right of the plaintiff to recover.

**FURTHER STATEMENT OF FACTS.**—Examined throughout, the transcript shows no objection to the right of the plaintiff to recover on the second note in the case, and as it is not suggested by the defendants that there is any defense to that note, further comment in that behalf is unnecessary. Attention of this court is invited only to the other note, and the argument is that it is illegal and void, because it secures by its very terms usurious interest. Legal interest in that state is six per cent. per annum, unless otherwise agreed between the parties, but contracts between the borrower and the lender of money may be made for a higher rate not exceeding ten per cent. per annum, as in this case, provided the agreement to that effect is expressed “in the face of the contract,” whether evidenced by bond, bill, note or other written instrument. Sess. Act, ch. 41, sec. 1, p. 31.

Debts created for the loan of money under an agreement to pay ten per cent., expressed as required in the statute, may be subsequently renewed for the same rate of interest, but the provision is that if any greater amount of interest than ten per cent. per annum is paid or agreed to be paid for the use of money, “the whole amount of interest so paid, or agreed to be paid, shall be forfeited by the payee.” Provision is also made by the sixth section of the act, that any person or persons who shall violate the provisions of that law shall be subject to indictment, as in other cases of misdemeanor, and be punished as therein provided. Sess. Act, p. 33, Code, 863.

Principal reason now urged for the reversal of the judgment is, that the first note described in the bill of exceptions is illegal, because the makers of the same promised to pay interest on the principal at the rate of ten per cent. per annum, commencing the computation two months and a half before the date of the note. Date of the note is November 15, 1860, and the agreement as expressed in the note is to pay interest at the rate of ten per cent. per annum from and after the 1st day of September last until paid.

Argument for the defendants is that the contract is usurious, and that, inasmuch as the loaning of money at a greater rate of interest is prohibited by law, and the violation of the provision is declared to be a misdemeanor, the

contract expressed in the note is illegal, and that the judgment should have been for the defendants. Suppose it be admitted that the presumption is as contended by the defendant, that the note was given for the loan of money, and that the contract is illegal, still the presumption is not a conclusive one, as the note may have been given for the purchase of goods, chattels, or lands, and the bargain may have been made and the property actually transferred on the exact day specified in the note, as the time from which interest is to be computed.

Promissory notes, if given under those circumstances, though bearing interest anterior to their date, are neither usurious nor illegal, unless the day described in the contract from which to compute the interest is anterior to the actual date of the transaction, and the transfer of the subject-matter of the purchase and sale, and it is quite clear that promissory notes in such a case, as between the original parties, are open to explanation.

§ 316. *Where defendant intends to rely on usury as a defense to suit on a note he should plead it, or raise the question in some form in the court below.*

Where the defendant intends to make such a defense he should plead it in the court of original jurisdiction, or raise the question in some form and present it for the decision of the court. Doubtless he may raise the question by plea, by objection to the introduction of the note in evidence, or by a prayer for instruction to the jury, but he cannot remain silent in the subordinate court and then present the objection for the first time in the court of errors, when it is too late for the plaintiff to offer any explanations, or to show what was the real nature and character of the transaction.

Nothing of the kind was done or suggested in this case by the defendants, but they pleaded the general issue, giving no notice of any such defense, and the note was introduced at the trial without objection, and there is nothing in the record to show, or tending to show, that the circuit judge ever made or was requested to make any ruling upon the subject. Parties relying upon such an objection should raise it at the trial before the jury, when the other party would have an opportunity to offer any explanations in his power to show that the contract was legal and valid.

§ 317. *Usury is a defense that must be strictly proved, and the court will not presume that bills or notes promising the payment of interest from a time anterior to their date were given for money lent on the day of their date.*

Bills or notes promising the payment of interest from a time anterior to their date, if the bills or notes so written are to be considered as conclusive evidence that they were given for money lent on the day of their date, would properly be regarded as usurious, but it is well known that bills and notes are often given subsequent to the transaction which constitutes their consideration and for property sold, and upon other transactions as well as for money lent. "Usury is a defense that must be strictly proved, and the court will not presume a state of facts to sustain that defense where the instrument is consistent with correct dealing." *Marvin v. Feeter*, 8 Wend., 533; *Holden v. Pollard*, 4 Pick., 173.

Universal rule is that where an instrument will bear two constructions equally consistent with its language, one of which will render it operative and the other void, the former will be preferred. *Archibald v. Thomas*, 3 Cowen, 290. Theory of the defendants is that the note is usurious and illegal on its face, but the authorities are clearly the other way, that the presumption is that the note was given upon a state of facts which authorized the taking



of the instrument, and that the contract was lawful and valid. *Andrews et al. v. Hart et al.*, 17 Wis., 307; *Leavitt v. Pell*, 27 Barb., 332; *Levy v. Hampton*, 1 McCord, 147. Tested as matter of principle, or by the decided cases, the better opinion is that the presumption is that such a contract is valid and not usurious, and that the burden to prove the contrary is upon the party who makes the charge.

*Judgment affirmed.*

ANDREWS v. POND.

(18 Peters, 65-80. 1839.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error, directed to the judges of the circuit court for the ninth circuit and southern district of Alabama. The action was brought by the plaintiff, as indorsee, against the defendants, as indorsers, of a bill of exchange, in the following words:

“Exchange for \$7,287.78.

NEW YORK, March 11, 1837.

“Sixty days after date of this first of exchange, second of same tenor and date unpaid, pay to Messrs. Pond, Converse and Wadsworth, or order, seven thousand two hundred and eighty-seven  $\frac{7}{10}$  dollars, negotiable and payable at the Bank of Mobile, value received, which place to the account of

“Your obedient servant, D. CARPENTER.

“*To Messrs. Sayre, Converse & Co.*,

“Mobile, Alabama.”

The case, as presented by the record, appears to be this: The defendants were merchants, residing in Mobile, in the state of Alabama. H. M. Andrews & Co. were merchants, residing in New York; and, before the above mentioned bill was drawn, the defendants had become liable to H. M. Andrews & Co. as indorsers upon a former bill for \$6,000, drawn by E. Hendricks on Daniel Carpenter, of Montgomery, Alabama. The last mentioned bill was dated at New York, and fell due on the 21st of February, 1837, and was protested for non-payment. The defendant Pond, it seems, was in New York in the month of March, 1837, shortly after this protest, when H. M. Andrews & Co. threatened to sue him on the protested bill; and the defendant Pond, rather than be sued in New York, agreed to pay H. M. Andrews & Co. ten per cent damages on the protested bill, and ten per cent. interest and exchange on a new bill to be given, besides the expenses on the protested bill.

According to this agreement an account, which is given in the record, was stated between them on the 11th of March, 1837, in which the defendants were charged with the protested bill, and ten per cent. damages on the protest, and interest and expenses, which amounted altogether to the sum of \$6,625.25, and ten per cent. upon this sum was then added, as the difference of exchange between Mobile and New York, which made the sum of \$7,287.78; for which the defendant Pond delivered to H. M. Andrews & Co. the bill of exchange upon which this suit is brought, indorsed by the defendants in blank. The bill was remitted by H. M. Andrews & Co. to S. Andrews, at Mobile, for collection. The drawees refused to accept it, and it was protested for non-acceptance; and, after this refusal and protest, it was transferred by S. Andrews to J. J. Andrews, the present plaintiff. It is stated in the exception

that, after this transfer, it was a cash credit in the account between H. M. Andrews & Co. and S. Andrews. The bill was not paid at maturity, and this suit is brought to recover the amount.

There is no question between the parties as to the principal or damages of ten per cent. charged for the protested bill of \$6,000; nor as to the interest and expenses charged in the account hereinbefore mentioned. The defendants admit that the principal amount of the protested bill, the damages on the protest which are given by the act of assembly of New York, and the interest and expenses, were properly charged in the account. The sum of \$6,625.25 was, therefore, due from them to H. M. Andrews & Co. on the day of the settlement, payable in New York. The dispute arises on the item of \$662.53, charged in the account as the difference of exchange between New York and Mobile, and which swelled the amount for which the bill was given to \$7,287.78. The defendants allege that the ten per cent. charged as exchange was far above the market price of exchange at the time the bill was given, and that it was intended as a cover for usurious interest exacted by the said H. M. Andrews & Co., as the price of their forbearance for the sixty days given to the defendants. This was their defense in the circuit court, where a verdict was found for the defendants, under the directions given by the court.

Many points appear to have been raised at this trial, which are stated as follows, in the exception taken by the plaintiff:

The defendant offered evidence:

1. To prove that the said bill of exchange was usurious, according to the statute and laws of the state of New York. The plaintiff objected to the reading of the statute and depositions aforesaid, because the contract was not made with a view of the statute or laws of New York. But the bill of exchange was usury or not by the laws and statutes of Alabama; and that the contract was subject only to the laws of the state of Alabama, as to its obligatory force and validity; and he further objected that, if this contract were to be decided by the statute of New York, that this proof could not be given under this issue; but the court overruled all these objections, and permitted the depositions and statute to be read, to show the bill of exchange to be void by the laws of New York; to all which plaintiff excepts.

2. Plaintiff then offered to prove, by Joseph Wood, that the banks purchased bills at a far less rate of exchange than others; that they never bought any other than undoubted paper; that, from the facility of collecting, remitting, etc., they had many advantages over the citizens at large, and that the exchange of the banks was therefore much lower than the community at large; that there was no fixed rate of exchange between Mobile and New York; that it varied from one to twenty per cent., according to the solvency, punctuality, risk, etc.; that exchange was ever fluctuating, and was high or low as the risk was great or small. The court rejected this testimony also, to which plaintiff excepts.

3. Plaintiff asked the court to instruct the jury that, if they were satisfied that the excess over legal interest retained in this bill was taken and contracted for innocently by the parties, without intending to violate the laws against usury, that they might find for plaintiff; but the court refused this also, and plaintiff excepts.

4. Plaintiff moved the court to charge the jury that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the

laws of Alabama against usury; and that the usury laws of New York had no force, or anything to do with this investigation. This was refused by the court, and plaintiff excepts.

5. Plaintiff next requested the court to charge the jury that, if they believed S. Andrews received the bill before maturity, for a valuable consideration, without any notice of usury, and that plaintiff received it from S. Andrews, without notice of usury, and before maturity, that the plaintiff might recover, notwithstanding plaintiff offered no proof of the consideration he gave for it. To this refusal there was also an exception.

6. Plaintiff next moved the court to charge that the variance between the bill declared on, and the one set up as the same bill by defendants' deposition, was fatal in a plea of usury; which the court refused, and plaintiff excepts.

7. It appeared that before the bill was delivered by S. Andrews to the plaintiff, it had been, while in the hands of S. Andrews, protested for non-acceptance, which appeared on the face of the bill. There was no evidence of any settled account between H. M. Andrews & Co. and S. Andrews, or which was creditor or debtor upon the statement of accounts. It was also proved that the expense of transporting specie from New York to Mobile, including insurance and interest, would not exceed one and one-half per cent. on the sum transported. Upon the whole case, and the several points stated, the court charged the jury that, if they believed, from the evidence, that by the usages of trade between New York and Mobile, there was an established rate of exchange between those places, the drawers and drawees of the bill of exchange here sued on had a right to contract for such rates of exchange, and that, even for a higher rate to a small amount, if under the circumstances it did not appear to have been intended to evade the statute against usury, might be allowed by them.

8. But if they believed that no such usage existed, the parties had no right to contract for more than the actual expense of transportation of specie from one place to the other, including interest, insurance, and such reasonable variations therefrom as above stated.

9. And further, if they believed, from the evidence, that the drawers of the bill of exchange contracted with the drawee in the state of New York, at the time the bill was drawn, for a greater rate of interest than seven per centum per annum, for the forbearance of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract is usurious; and unless they believe, from the evidence, that the plaintiff took the bill in the regular course of business, and upon a fair and valuable consideration, *bona fide* paid by him, and without notice of the usury, they ought to find for the defendants, otherwise for the plaintiff.

From the manner in which the points are arranged in this exception, and the similarity of the questions presented in some of them, we shall be better understood by expressing our opinion on the whole case, as it appears before us, without regarding the order in which the questions are stated in the exception, and without examining separately each one of the instructions asked for by the plaintiff, and refused by the court.

The transaction, upon the face of it, does not profess to charge any interest for forbearance. It is a bill of exchange in the usual form; and in the account stated at the time, and which formed the basis of the bill, the only item in relation to interest is the small sum charged for the eighteen days which intervened between the time when the first bill became due and the present one

was given. This interest is charged at seven per cent., which is the legal rate of interest established in New York. The transaction, taken altogether, was indeed a ruinous one on the part of the defendants. A debt of \$6,000, payable at Mobile on the 21st of February, was converted into a debt of \$7,287.78, payable at the same place on the 25th of April following; being an increase of \$1,287.78, in the short space of eighty-one days. Yet if the defendants brought it upon themselves, by their failure to take up the first bill at maturity, and the transaction was not intended to cover usurious interest, they must meet the consequence of their own improvidence. The sum of \$6,625.25 was undoubtedly due from them to H. M. Andrews & Co. on the day the bill in question was drawn. They were entitled to demand that sum in New York, or a bill that was equivalent to it at the market price of exchange; and if ten per cent. discount was the usual price at which others purchased bills of this description in the market of New York, they had a right to take the bill at that rate, in satisfaction of their debt. There is nothing, therefore, upon the face of the papers, from which the court can undertake to say that usurious interest was exacted.

§ 318. *Although a bill appears on its face free from usury, yet if any part of the amount charged as exchange was to cover up usury, it is usurious.*

But although the transaction, as exhibited in the account, appears on the face of it to have been free from the taint of usury, yet, if the ten per cent. charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usurious agreements; and if the fact be established, it must be dealt with in the same manner as if the usury was expressly contracted for in the bill itself.

§ 319. *Where the question of usury depends upon evidence other than the face of the contract, it is exclusively for the jury.*

But whether this item was intended as a cover for usury or not is a question exclusively for the jury. It is a question of intent.

§ 320. *Where usury is charged as being covered by exchange between two cities, evidence on both sides is admissible to show the usual rate of exchange.*

And, in order to enable the jury to decide whether usury was concealed under the name of exchange, evidence on both sides ought to have been admitted which tended to show the usual rate of exchange between New York and Mobile, when this bill was negotiated. There is no rule of law fixing the rate which may be lawfully charged for exchange. It does not altogether depend upon the cost of transporting specie from one place to another, although the price of exchange is, no doubt, influenced by it. But it is also materially affected by the state of the trade, by the urgency of the demand for remittances, and by the quantity brought into the market for sale; and sometimes material changes take place in a single day, although no alteration has happened in the expenses of transporting specie. The court, therefore, can lay down no rule upon the subject. H. M. Andrews & Co., when about to take this bill in payment of an existing debt, had a right to include in it a fair allowance for the difference in exchange. Whether they exacted more or not, for the forbearance of their debt, is a question for the jury to decide; and, in order to enable them to decide it correctly, they must be allowed to hear the evidence which either of the parties may offer, as to the rates of exchange for such a bill as this, which was payable in specie, and not in any depreciated currency.

§ 321. *Where there is no rate of exchange the creditor is not restricted to the expense of transporting specie.*

Taking this view of the subject, we think the court below erred in rejecting the testimony of Joseph Wood, who was offered by the plaintiff to prove the rate of exchange; and also in the direction given to the jury, that, if there was no fixed rate of exchange, the creditor had a right to take no more than the actual expense of transporting the specie, or a small amount more, where the addition was not intended to cover usury.

Another question presented by the exception, and much discussed here, is whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned, this question is not very important. There is no stipulation for interest apparent upon the paper. The ten per cent. in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent., and in Alabama eight; and this small difference of one per cent. per annum, upon a forbearance of sixty days, could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon an usurious consideration, the plaintiff would not be entitled to recover, unless he was a *bona fide* holder, without notice, and had given for it a valuable consideration; while by the laws of Alabama, he would be entitled to recover the principal amount of the debt, without any interest.

§ 322. *Contracts are governed by the laws of the place of performance.*

The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co. for the debt then due to them, payable at Mobile, in sixty days, with eight per cent. interest, such a contract would undoubtedly have been valid; and would have been no violation of the laws of New York, although the lawful interest in that state is only seven per cent. And if in the account adjusted at the time this bill of exchange was given, it had appeared that Alabama interest of eight per cent. was taken for the forbearance of sixty days given by the contract, and the transaction was in other respects free from usury, such a reservation of interest would have been valid and obligatory upon the defendants; and would have been no violation of the laws of New York.

§ 323. *An illegal contract, entered into in one state to be executed in another, is governed by the *lex loci contractus*.*

But that is not the question which we are now called on to decide. The defendants allege that the contract was not made with reference to the laws of either state, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debts actually due; and that it was concealed under the name of exchange, in order to evade the law. Now if this defense is true, and shall be so found by the jury, the question is not which law is to govern in execut-

ing the contract, but which is to decide the fate of a security taken upon an usurious agreement which neither will execute? Unquestionably, it must be the law of the state where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus*; and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine.

§ 324. *A contract of forbearance which goes beyond the legal interest, and the market price for good bills, is usurious.*

In the case of *De Wolfe v. Johnson*, 10 Wheat., 383, this court held that the *lex loci contractus* must govern in a question of usury, although by the terms of the agreement the debt was to be secured by a mortgage on real property in another state. And the case of *Dewar v. Span*, 3 T. R., 425, shows with what strictness the English courts apply their own laws against usury to contracts made in England. In the case under consideration, the previous debt for which the bill was negotiated was due in New York; a part of it, that is to say, the damages on the protest of the first bill, were given by a law of that state; and the debt was then bearing the New York interest of seven per cent., as appears by the account before referred to. And if, in consideration of further indulgence in the time of payment, the parties stipulated for a higher interest, and agreed to conceal it under the name of exchange, the validity of the instrument, which was executed to carry this agreement into effect, must be determined by the laws of New York, and not by the laws of Alabama.

In this aspect of the case, another question arose in the trial in the circuit court. By the laws of New York, as they then stood, usury was no defense against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration, and without notice of the usury. The present plaintiff claims the benefit of this provision. But upon the evidence in the case, it is very clear that he does not bring himself within it. The bill of exchange was protested for non-acceptance, while it was in the hands of S. Andrews, the agent of H. M. Andrews & Co., to whom it had been sent for collection; and this fact appeared on the face of the bill at the time it was transferred to the plaintiff.

§ 325. *One who takes a dishonored bill is not a bona fide holder, for value without notice, and takes it with all its infirmities.*

Now a person who takes a bill, which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it.

§ 326. — *and whether it was dishonored for non-acceptance or non-payment is immaterial.*

There can be no distinction in principle between a bill transferred after it is dishonored for non-acceptance, and one transferred after it is dishonored for non-payment; and this is the rule in the English courts, as appears by the case of *Crossley v. Ham*, 13 East, 498. Now it is evident that no consideration

passed between Carpenter, the drawer of the bill, and the defendants, who are the payers and indorsers. The bill was made and indorsed by the defendants, for the purpose of being delivered to H. M. Andrews & Co., in execution of the agreement for further indulgence. And if that agreement was usurious, then the bill in question was tainted in its inception; and that taint must continue upon it in the hands of the present plaintiff.

There is one other direction given by the circuit court which remains to be considered. It is the third, as stated in the exception. The vagueness and generality of the terms in which this instruction was asked for by the counsel for the plaintiff justified the court in refusing it. It will be seen from what we have already said, that if the rate of exchange taken upon this bill was a fair one, and was not intended to cover usurious interest, the plaintiff is entitled to recover, and if the payer means nothing more than this, there could be no objection to it. But if it was intended to maintain that although a higher rate of exchange was allowed than the fair market price, and that this was done in consideration of the forbearance of payment, under the belief that the law would not in that shape regard it as usury, the mistake of the parties in this respect will not alter the character of the transaction. The instruction as asked for was framed in such general terms that it might have misled the jury; and the court, therefore, were not bound to give it.

In fine, if the parties intended to allow no more than a fair rate of exchange, testing it by the market price of good bills of this description, it was not usury; and the plaintiff is entitled to recover. If, on the contrary, more was intended to be taken, it was usury; and the plaintiff is not entitled to recover. It is true that, after this bill had been negotiated between H. M. Andrews & Co. and the defendants, other persons might have lawfully purchased it at a much greater discount than the market rate of exchange; and might have considered and estimated, in the price they gave for it, the known embarrassments, the want of punctuality, and the loss of credit of the defendants, whose former bill had already been protested. But as between the debtor and his creditor, no difference in the rate of exchange can be made on that account. If, in consideration of further forbearance, the creditor receives a new security from his debtor for an existing debt, he cannot enlarge the amount due by exacting anything either by way of interest or exchange, on account of the additional risk he may suppose he runs by this extension of credit; nor on account of any doubts he may entertain as to the punctuality of payment, or the ultimate safety of his debt.

§ 327. *Under a plea of non-assumpsit the defendant may give evidence of usury.*

It is hardly necessary to add that the right of the defendant to offer in evidence, under the plea of *non-assumpsit*, that the instrument was given upon an usurious contract, has been too well settled to be now disputed, and we see nothing in the record, upon which a question for the court could be raised, upon the supposed variance between the bill mentioned in the testimony produced by the defendants, and the bill declared on by the plaintiff.

Upon the whole, we dissent from the circuit court in the second and eighth points in the exception, as we have already mentioned; and we concur with them in the residue.

The judgment of the circuit court must, therefore, be reversed, with costs.

## WALKER v. BANK OF WASHINGTON.

(3 Howard, 62-72. 1844.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.— This suit is brought upon a promissory note, given in renewal of a former note, which had been discounted by the defendants in error. The defendants in the court below deny that the plaintiffs have any right of action upon the note sued on, on the ground that the first note was tainted with usury.

§ 328. *Change of securities in case of usury.*

Such is the law in such a case. The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void. *Tut-hill v. Davis*, 20 J. R., 285; *Reed v. Smith*, 9 Cow., 647, and the cases of *Sauerweir v. Brunner*, 1 Harr. & Gill, 477; *Thomas v. Catheral*, 5 Gill & Johns., 23, decided in the courts of appeal in Maryland, under the statute of which state, it is said, the note now sued upon is void. But such is not the case before us. The defendant Walker had entered into a contract with the United States to supply the navy with beef; and to enable himself to do it he applied to the bank, by letter dated the 30th of January, for a loan of \$25,000, and offered as a security a draft upon E. Kane, the navy agent, and also to assign to the bank the beef which he might put up. The bank accepted his offer, but before Walker gave the draft upon Mr. Kane, or made the assignment, he drew his note on the 6th of February, seven days after he had written his letter asking for a loan for \$10,000, at ninety days, and handed it into the bank, which note at maturity was renewed by the note of the 9th of May, now in suit. This note, however, was not discounted until the 18th of February, and when then done the proceeds were not passed to his credit until the 22d. The cause of the delay, in both particulars, the proof in the case shows, was that Walker did not, until the 19th of February, draw his draft upon the navy agent, as he had proposed to do, or make an assignment of the beef to the bank until the 20th. He may or may not have passed the navy agent's acceptance to the bank on the day it is dated, or have delivered his deed for the beef the day after; but between those days and the 22d inclusive, he did so, and the bank's security being then in its possession as he had offered it, the proceeds of his \$10,000 note was, on the last-mentioned day, passed to his credit. But, in the meantime, Walker had drawn out of the bank, upon his checks, more than \$7,000, with which he was debited when the proceeds of his note were carried to his credit, which sum, and the interest upon it, computed for ninety-four days from the date of the note, left a balance to his credit of \$997.86. The computation of the interest from the 6th of February instead of from the day when the proceeds were carried to his credit is the usury complained of.

The letter of the defendant of the 30th of January asking for the loan of \$25,000; the acceptances of his drafts upon the navy agent by that officer, and the defendant's assignment to the bank of certain portions of the beef which he had on hand, and which he might put up under his contract with the United States, and which assignment was not executed until the 20th of Feb-



ruary, were in evidence before the court below. The assignment recites the defendant's contract with the United States, so far as it was necessary to introduce the contract which he was about to make in it with the bank; then his indebtedness to the bank for loans and discounts, his intention to secure the payment of the money due by him, and all drafts, note or notes that have been given for the same, or might be afterwards given by way of substitution or renewal of such drafts or notes, or any of them, etc., etc., and then states that the money which had already been advanced or loaned, or which might afterwards be advanced or loaned, by the bank to the defendant, being for the purpose of enabling him to fulfill his contract with the United States. Now, the proof is positive, on both sides, that the note sued on was given in renewal of the note of the 6th of February, which had first been given under his proposal for a loan, and that it was intended to be the note, the payment of which was to be secured by the assignment. Such being the evidence, the court correctly refused every instruction which was asked to refer the question of usury to the jury as a fact. It was a case of a written contract, in which the court had the exclusive power of deciding whether it was usurious or not. *Levy v. Gadsby*, 3 Cranch, 180. But, if it were not so, we think the instructions, as they were asked, could not have been given by the court to the jury. Each of them called upon the court to give an opinion upon the sufficiency of the evidence, and in all of them except the eighth there was a separation of the facts from the entire evidence, so as to bring them under the cases of *Scott v. Lloyd*, 9 Pet., 418 (§§ 441-46, *infra*); *Greenleaf v. Birth*, 9 Pet., 292; and that of the *Chesapeake & Ohio Canal Co. v. Knapp*, 9 Pet., 541.

§ 329. *It is proper to instruct the jury that they are to decide whether the inferences the witness draws from the facts he narrates are correct or not.*

Nor do we think that there was any error in the instruction given by the court to the jury under the defendant's first prayer. The court sufficiently distinguish between the facts of the cashier's evidence and his belief, and tell the jury that they are to determine by the facts whether the cashier's inferences were justified.

The judgment of the court is affirmed.

#### BANK OF ALEXANDRIA v. MANDEVILLE.

(Circuit Court for the District of Columbia: 1 Cranch, C. C., 552-566. 1809.)

Opinion by CRANCH, J.

STATEMENT OF FACTS.—This is an action of debt brought by the Bank of Alexandria against Mandeville, to charge him as the secret partner of R. B. Jamesson, the maker of a promissory note for \$800, payable sixty days after date to the order of W. Herbert, in the Bank of Alexandria. The defendant pleads:

1. That on the 26th of May, 1806, it was corruptly agreed between the plaintiff and R. B. Jamesson that the plaintiff should advance and lend R. B. Jamesson \$791.60, and should give day of payment thereof until sixty days from the 26th of May, 1806, and also three days of grace thereafter, and that R. B. J. should give his note therefor with W. Herbert, an indorser, for \$800 dated the 26th of May, 1806, payable sixty days after date, which said sum of \$8.40 was for the interest and profit therefor, and for giving day of payment of the said \$800 for the said sixty days and the said three days of grace, which said sum of \$8.40 exceeds the rate of \$6 for the interest of \$100 for one whole

year, contrary to the form and effect of the statute in such case made and provided.

The plea then avers that the note was so made and indorsed, and the plaintiffs advanced and paid to R. B. J. the sum of \$791.60, by which the note, by force of the statute, is void in law, and this he is ready to verify.

2d plea. That on the 26th of May, 1806, it was corruptly agreed, etc., that R. B. J. should draw his note in the declaration mentioned in favor of W. Herbert, who should indorse the same, dated 26th of May, 1806, at sixty days after date, and the plaintiffs would pay him on the 27th of May, 1806, \$800 upon condition that R. B. J. would, on the 27th of May, 1806, pay the plaintiffs the sum of \$8.40, as interest upon the \$800 for sixty-three days from the date of the note, which sum of \$8.40 was, on the 27th of May, deducted from the \$800, and the balance of \$791.60 on that day paid to R. B. J., which sum of \$8.40, the interest at six per cent. on \$800 for sixty-three days, for the loan of \$800 for sixty-two days, exceeds the rate, etc.

3d plea. That it was on the 26th of May, 1806, corruptly agreed that the note should be drawn, etc., and that the plaintiffs would discount \$800 on account of said note, which should be held for the payment thereof at the expiration of the sixty days and the three days of grace, upon the express condition that the interest upon the \$800 for the sixty-three days, amounting to \$8.40, should be deducted from the \$800, leaving the sum of \$791.60 to be paid to the said R. B. J., which sum of \$791.60 was, on the 27th of May, paid to R. B. J. by the plaintiffs. That only the sum of \$791.60 was actually loaned to R. B. J., and for the forbearance of the said \$791.60 for the sixty-three days the plaintiffs charged \$8.40, which said sum of \$8.40, the interest and profit charged for the loan and advance of \$791.60 for sixty-three days, exceeds the rate, etc.

Replication to the 1st plea. Protesting that it was not corruptly agreed, etc., as stated in the plea, that the plaintiffs should advance and lend to R. B. J. the sum of \$791.60, and should give day of payment. etc., and that R. B. J. did not in pursuance of such supposed corrupt agreement execute the note, etc., to be held by the plaintiffs for the payment of \$800 at the expiration of the said sixty-three days; and that the plaintiffs did not, in prosecution of such supposed corrupt agreement, advance and pay, etc. For replication says that R. B. J. offered the note to the plaintiffs, according to the usage and custom of the said bank, indorsed by W. H., to be discounted by the plaintiffs according to the usage, practice and custom of the said Bank of Alexandria, and all other banking companies. "And the plaintiffs aver that they did not in pursuit of any corrupt agreement, or of any illegal contract, but in pursuance of the legal custom, practice and usage of the said bank, discount the said note, and did in pursuance thereof pay over to the said R. B. J. the said sum of \$791.60, detaining the sum of \$8.40 as the discount for the said sum of \$800 for sixty-three days, being at the rate of six per cent. per annum, as they might lawfully do; and this they are ready to verify."

To this replication there is a general demurrer, which admits the facts as stated in the replication, if they are well pleaded. The question then is, whether those facts disclose an usurious transaction?

The facts stated in the replication are in substance: That R. B. Jamesson offered his note for \$800, payable in sixty days after date, to W. Herbert's order, and by him indorsed according to the usage of the bank, to the plaintiffs, to be discounted by them according to their usage, and that of all other

banks; and that the plaintiffs discounted it according to their usage by paying to R. B. J. \$791.60, and detaining the sum of \$8.40 as the discount for the sum of \$800 for sixty-three days, being, as they aver, at the rate of six per cent. per annum.

At the time of the first incorporation of the Bank of Alexandria, the Virginia statute of usury had enacted "that no person shall hereafter, upon any contract, take directly or indirectly, for loan of any money, wares or merchandise, or other commodity, above the value of £5 for the forbearance of £100 for a year, and after that rate for a greater or lesser sum, or for a longer or a shorter time; and all bonds, contracts, covenants, conveyances or assurances hereafter to be made for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void." The second section imposes a penalty on any person who shall take, accept or receive more than the interest thereby allowed. And by the third section any borrower of money may exhibit a bill in chancery against the lender, and compel him to discover on oath, etc. This was the law in the year 1792, when the Bank of Alexandria was incorporated, and although the interest of money generally was then limited by law to five per cent., the bank was authorized "to receive for discounts made at the bank at a rate not exceeding six per cent. per annum." In May, 1797, the lawful rate of interest was raised by act of assembly to six per cent.

It is contended on the part of the bank that the transaction disclosed by the replication is not usurious, upon two grounds: 1. Because the statute of usury does not affect bodies politic and corporate. 2. Because the use, custom and practice of all banking companies in discounting bills and notes is to take interest upon the nominal amount of such bills and notes, and not upon the sum actually loaned by way of discount; and the word discount in the charter of the bank is to be explained by reference to such usage, and not to the common arithmetical rule of discount.

§ 330. *The statutes of usury apply as well to contracts of corporations as to those of natural persons.*

In support of the first ground, that the statute of usury does not bind bodies politic, it is said that the statute is penal, and must be construed strictly. That the word person must be confined to natural persons; and although the act says that all bonds, etc., shall be void, yet it means all bonds, etc., made by such persons. But the court is not of that opinion. The taking of exorbitant interest by great moneyed institutions and corporations was an evil as much within the mischief intended to be remedied as if the same should be taken by a natural person; and when by the letter of the law all bonds, etc., are made void, we think it as much within the spirit of the act as within its letter.

§ 331. *A bank may deduct the whole interest on discounted notes for the whole time they have to run.*

The second ground on which the plaintiffs rest the legality of the transaction is more substantial. The question which it raises is, whether the bank, in discounting this note for \$800 for sixty-three days, had a right to retain \$8.40 as the discount therefor. If the agreement stated in the replication be such as the bank was authorized by its charter to make, the question of usury cannot arise.

The preamble of the charter (or rather of the act of assembly of Virginia, which incorporated the bank, and which has been decided by the supreme court to be a public act), in enumerating the benefits expected from the establish-

ment of such an institution, and the objects which the legislature had in view, says, "and by discount rendering easy and expeditious the anticipation of funds." That kind of discount, therefore, which would enable a person to anticipate his funds, was a transaction which the legislature intended to authorize.

In the body of the act, in section 8, where certain powers are granted to the bank, it says, "and to receive for discounts made at the said bank, at a rate not exceeding six per cent. per annum." By allowing the bank to take six per cent. for discounts, when only five per cent. could be taken for interest on a loan, without taking notice of any repugnance between the two statutes, a strong presumption arises that the legislature considered the discount by which funds could be anticipated as a transaction very distinct from a simple loan of money. But this presumption does not rest alone upon the circumstance that the legislature did not notice a repugnance between the two statutes. The distinction between an anticipation of funds by discount and a loan of money upon interest exists in the nature of things. Suppose I ship a cargo of flour to a merchant in Boston, who in payment remits me a bill of exchange at sixty days' sight upon a merchant in Alexandria who accepts it. I wish to anticipate this fund. I apply to the bank to discount it. Do I ask for a loan? Do I wish to borrow the money? No. I am entitled to receive a sum of money at the end of sixty days, but I wish to anticipate the receipt of it. I wish to receive it now instead of then. The bank discounts this bill. If it were a loan from the bank to me, I should be the principal debtor and the first person liable to the bank; but in truth, by indorsing the bill to the bank, I become only a collateral and conditional debtor. The acceptor is the principal debtor to the bank and to him must they first apply for payment; if not paid they must protest and give notice to me of the non-payment as soon as possible under all the circumstances, and if they neglect to demand payment from the acceptor or to give me due notice of his non-payment, they have no claim upon me. Can this then be a loan of money from the bank to me? Nothing can be more different. I am only liable as the indorser of a bill. If it were to be considered a loan at all, it should rather be a loan to the acceptor, the principal debtor in the transaction. But it is not a loan to any person; it is a mere accommodation in shortening the time of payment. It was said in argument that the transaction must be either a loan of money or a purchase of the note, and that it could not be a purchase if the vendor guaranteed the bill by indorsement, and that the bank was not authorized to trade in the purchase of bills, consequently it must be considered as a loan. This is clearly a *petitio principii*. It assumes the principle in dispute. There is a transaction which is neither a loan nor a purchase of the note, and that transaction is discount. If it be not a loan, it cannot be the forbearance of a sum of money lent. If it be neither a loan nor the forbearance of a sum of money lent, it is not a transaction prohibited by the statute of usury.

A clear case, then, of mercantile discount, being the anticipation of funds and not a loan of money, is not within that statute. Thus stands the case upon general principles of law and reason. Let us see how it stands upon authority.

§ 332. *A usage cannot control a statute.*

But here let me repel a suggestion that this court can set up the custom and usage of any trade or profession in England, or even in this country, in direct opposition to the express statutes of the land. We disclaim any such power,

and we disclaim all discretion in deciding a point of mere law. It has been said that, in considering this question, we ought not to regard English authorities — that we are competent to make and expound our own laws. It is true that English authorities, as such, are not binding on the courts in this country. But no prudent man who is to decide a question will shut his ears to reason or argument, from whatever part of the world it may come. Upon the present question, I hold it to be not only our right, but our duty, to look into the decisions which have taken place upon questions of usury in England, especially decisions made prior to the date of the statute of usury in Virginia; because that statute is copied almost, if not exactly, *verbatim* from the English statute; and it is fair to conclude that the Virginia legislature, when they adopted the words of the English statute, meant to use them in the sense in which they were used in England; and as they had been explained and settled by judicial decision in that country, I hold it also fair to conclude that when the legislature of Virginia were passing a law upon the subject of a banking institution, and used technical terms appropriate to the business of banking, they used them in the sense in which those terms were generally used among bankers, not only in this country, but in other parts of the world where that business is carried on. In order to ascertain in what sense such terms have been used, I deem it competent for the court to get information from the general history of a country, and especially from its judicial decisions.

In this point of view, then, the court feels itself bound to look into the English decisions, to see in what sense certain technical terms have been used in that country — and to see what cases have been considered as out of their statute of usury, from which ours is copied.

§ 333. *Mercantile discount is not a loan of money within the usury laws.*

Let us then inquire whether a clear mercantile discount, being an anticipation of funds, and not a loan of money, is or is not usury under the English statute. The first case which I find is that of *Barnes v. Worledge, Noy, 41*. This case was under the statute of Elizabeth, allowing ten per cent. The agreement was to pay £5 for the first six months, and £5 for the second six months, and it was adjudged no usury. "But by Popham, if the party had retained £5 of £100 at the time of the leave, or that that £5 was to have been paid before the six months, that clearly had been usury."

*Worley's Case, S. C., Moore, 644.* Popham, Gawdy and Yelverton held that, although the loan was for a year, yet it was no usury to take half the interest at the end of half a year. "But it is otherwise if one deducts the interest out of the principal at first."

*Barnes v. Worlich, S. C., Cro. James, 26.* Popham, Gawdy and Williams held the principal case no usury. But said "if he had agreed to take his money for the forbearance instantly when he lent it, that had made the assurance void; for then he had not lent the entire sum for one year, and the other had not had the use of his money according to the intention of the law. And Williams said he knew upon this difference it hath been so resolved of late time."

*S. C., Yelverton, 30.* In Yelverton, 30, it is said that the court was divided as to the principal case, two of the judges being of opinion that upon a loan for a year one-half of the interest could not be received at the end of half a year, — but he says "if £100 be lent for a year, and the lender within two days following takes back £10, this is usury."

So in *Dalton's Case, Noy, 171*, it was said by Popham, "If a man lend £100

for a year, and to have £10 for the use of it, if the obligor pays the £10 twenty days before it is due, that does not make the obligation void, because it was not corrupt. But if, upon making the obligation, it had been agreed that the £10 should have been paid within the time, that should have been usury; because he had not the £100 for the whole year, when the £10 was to be paid within the year; and verdict was given accordingly."

In *Massu v. Daaling*, 2 Str., 1243, a note for £200 having three months to run was taken upon advancing £197, five per cent. per annum, being the legal interest; and at the end of the third month another note was taken for three months more upon the advance of £3 for the other three months. Lee, C. J., held it to be usury.

In *Fisher qui tam v. Beasley*, Doug., 235, Grindall borrowed of Beasley £100, and gave bond payable in six months with lawful interest; but he paid down two guineas as premium. There was no doubt that this was usury, but the question was at what time the usury was complete, whether at the payment of the two guineas or at the expiration of the six months. It was decided that the penalty was not incurred till the end of the six months when the interest was paid.

In the case of *Lloyd qui tam v. Williams*, 2 W. Bl., 792, De Grey and Blackstone inclined to think that if a man borrows £100 for three months, and immediately returns to the lender £6 5s. 0d. by way of interest by advance, the offense of taking more than legal interest is complete, and it is not to be considered as a loan of £93 15s. only.

This opinion of De Grey and Blackstone was against that of Gould. Nares gave no opinion. There is in that case a *dictum* of Judge Blackstone, "That interest may as lawfully be received beforehand for forbearing, as after the term has expired for having forborne. And it shall not be reckoned as merely a loan of the balance. Else every banker in London who takes five per cent. for discounting bills would be guilty of usury. For if upon discounting a £100 note at five per cent. he should be construed to lend only £95, then at the end of the time he would receive £5 interest for the loan of £95 principal, which is above the legal rate."

In *Gibson v. Fristoe*, 1 Call, 73, the court of appeals of Virginia say that if it be apparent to the court that the matter is usury, the jury need not find the agreement to be corruptly made; and that an agreement by which a man secures to himself directly or indirectly a higher premium than legal interest for the loan of money is usury.

In *Floyer v. Edwards*, Cowp., Lord Mansfield says, "It depends principally upon the contract being a loan, and the statute uses the words 'directly or indirectly;' therefore, in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained to satisfy the court that there is a loan and borrowing; and that the substance was to borrow on the one part and to lend on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money, nothing will protect the taking more than five per cent.; and though the statute mentions only 'for loan of moneys, wares, merchandises or other commodities,' yet any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'" Speaking of the practice of the particular trade to take a half penny an ounce on certain goods if not paid for in a certain time, he says, "It is true the use of this practice will avail noth-

ing, if meant as an evasion of the statute; for usage certainly will not protect usury; but it goes a great way to explain a transaction; and in this case is strong evidence to show that there was no intention to cover a loan of money. Upon a nice calculation it will be found that the practice of the bank in discounting bills exceeds the rate of five per cent., for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, namely, by deducting the interest first; yet this is not usury."

These were all cases of loan, and not of mercantile discount. I can find no case in which it was ever made a question whether, in a clear mercantile discount, the taking in advance by way of discount the whole interest, upon the whole sum, for the whole time the bill has to run, was within the statute of usury.

The cases which come nearest to that question are those where the discount had been made in that manner, but the sum advanced was not all paid in cash, but partly in other bills having time to run, or in goods at a high price. The circumstance that, although usury was pleaded in those cases, it was not attempted to support it upon the ground that the interest was calculated upon the face of the bill, and not on the sum actually advanced, is good ground to infer that the whole court and bar considered such a transaction alone, not to be usury.

This inference is irresistible when we reflect that as early as the year 1771, Judge Blackstone, uncontradicted by his brethren on the bench, in the case of *Lloyd v. Williams*, 2 W. Bl., 792, declared his opinion to be that bankers in discounting bills may lawfully receive the interest beforehand upon the whole amount of the bill; and when we find Lord Mansfield, in the year 1774, in the case of *Floyer v. Edwards*, Cowp., 114, declaring from the bench, with the concurrence of the three other judges, that "the practice of the bank in discounting bills exceeds the rate of five per cent., for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, namely, by deducting the interest first; yet this is not usury."

The cases to which I alluded as those in which the present ground for the allegation of usury existed, but was not relied upon, are, 1. *Benson v. Parry*, cited by Judge Buller in *Auriol v. Thomas*, 2 T. R., 52. The question there was whether country bankers could take more than five per cent. on inland bills payable at another place; and it was decided by the court of king's bench unanimously that they might. No question was made whether it was usury for them to take five per cent.

2. The case of *Winch qui tam v. Fen*, cited by Buller in the same case, where the same question was decided, and no question made as to the five per cent. deducted.

3. The case of *Auriol v. Thomas*, 2 T. R., 52, in which the court says, "it is now clearly settled that the party is entitled to take not only £5 per cent. for legal interest, but also a reasonable sum for remitting and other incidental expenses." And Grose, J., says, "The line which has been taken is, that if the sum charged be not a color or a screen for usury, but is only fair and reasonable, it ought to be allowed."

4. The case of *Hammett and others v. Yea*, in the court of common pleas, 1 B. & P., 144, which was this: Haviland made his promissory note payable to Yea, the defendant, at four months after date, for £3,000, which Yea indorsed and returned to Haviland, who took it to the plaintiffs, who were bankers, to be discounted for the accommodation of Haviland, the maker of the

note. The plaintiffs discounted it by deducting £50, being four months' interest on £3,000, and paying £2,950, the balance, to Haviland, partly in a draft having thirty days to run, partly by crediting Haviland in account, and the residue in cash; and this mode of payment was directed by Haviland or his agent.

These facts were relied on in the plea of usury. But the judge (Eyre, C. J.) at the trial directed the jury that the charge of usury rested wholly on the plaintiffs having made no rebate of interest on the bill at thirty days, which was paid to Haviland as cash at the time of discounting the £3,000 note, and left it to the jury to say whether it was a pretense to evade the statute. The jury found a verdict for the plaintiff; and on motion for a new trial, Eyre, C. J., says, "whether more than five per cent. be intentionally taken upon any contract for forbearance is a question of fact for the consideration of the jury, and must always be collected from the whole of the transaction." Again he says, "what is this case in matter of fact? Haviland applies to have his bills discounted, to which the banker agrees and calculates the interest upon the time the bills have to run, as is usual." "Had the banker told down the money, or tendered bank notes, and had Haviland put them into his pocket or swept them into his hat, and then said, but I want to send money to London; will you take part of my money back and give me bills? and the banker had accordingly done so and given these bills, I cannot see that there would have been any color for calling it a usurious transaction."

He here admits that the mode of calculating the discount and deducting it from the principal, upon discounting a bill or note, is the usual practice, and there is no color of usury in it. Again he says, "If all consideration of a loan were out of the case, a banker may lawfully take as much money as he can get for his bills, without the least regard to the time they have to run." And again, "whether more than five per cent. be intentionally taken for the loan and forbearance of money is a question of fact to be decided by the jury." "It is for them to say whether it is a device or a fair agreement on good consideration."

Heath, J., was of the same opinion. He says: "This was a transaction which commenced in discount and loan and terminated in remittance. The subsequent transaction of remittance was no part of the antecedent contract; the bargain for the discount was complete." He considers the discount and loan clearly as a lawful transaction. Rooke, J., concurred. We find the whole court unanimous, not only that the original discount was lawful, but the subsequent payment in bills instead of cash.

5. The case of *Maddock qui tam v. Hammett*, 7 T. R., 184, which was decided in the king's bench about six months before the case of *Hammett v. Yea*. The facts relied on to support the usury were that Haviland made his note to Yea for £1,000 at four months, who indorsed it. Haviland, the maker, took it to the defendants, Hammett and others, the bankers, to be discounted, who discounted it

By paying in cash.....	£188 6 8
In bank notes.....	800 0 0
Draft on London, at seven days' sight. ....	500 0 0
	<hr/>
	£988 6 8
Retained for discount.....	16 18 4
	<hr/>
	£1,000 00 0



The only usury relied on "was stated to consist in calculating the draft of £500 as cash, when it had seven days to run, instead of deducting so much from the discount as the draft had to run before it became payable." There the original discount of £16 13s. 4d. was not contended to be usurious, although it was the interest of the whole £1,000 for the whole time the note had to run.

6. The case of *Marsh v. Martindale*, 3 B. & P., 154. The facts of this case upon the plea of usury were these: Wood, in consideration of £3,500 paid by Marsh, had granted him an annuity of £500 per annum, redeemable upon certain terms. Wood applied to Marsh to redeem. And it was agreed that Wood should draw a bill of exchange for £5,000 at three years, which Marsh should discount. The £5,000 bill was accordingly drawn and discounted by Marsh as follows:

Original purchase of annuity.....	£3,500	0	0
Arrears of annuity due.....	333	6	8
For redeeming without notice, according to original agreement.....	250	0	0
Cash paid to Wood.....	116	13	4
	<hr/>		
	£4,250	00	0
Three years' discount on £5,000 at five per cent.....	750	00	0
	<hr/>		
	£5,000	00	0

In this case it was contended and decided that the discount of a bill for three years was not a transaction in the usual course of business, and afforded a strong ground, in connection with the circumstance of the annuity and a bond given immediately after the discount of the bill, to presume that the whole transaction was a color for a loan and a cover for usury. And upon that ground the court set aside the verdict for the plaintiff, and ordered a nonsuit to be entered.

The principle decided by this case was not that, in ordinary cases of discount, the banker has not the right to deduct interest upon the whole amount of the bill for the time it has to run, but that in extraordinary cases, where the time the bill has to run is unusually long, that circumstance, with others, may be evidence of a mere contract for a loan, and an evasion of the statute.

The general principle is admitted by the counsel on both sides and by the court, that "it is lawful upon the discount of a bill of exchange to take interest upon the whole amount of the bill at the time when the money is advanced," but it was contended that this principle "must be confined to transactions upon bills in the ordinary course of trade." It was said that it "was too much to infer that because bills in the ordinary course of trade may lawfully be discounted in the manner above stated, a bill for any period of time may be discounted in the same manner."

Lord Alvanley, C. J., in delivering the opinion of the court, says, "it certainly has been decided that such a transaction on a bill of exchange in the way of trade, for the accommodation of the party desirous of raising money, is not usurious, though more than five per cent. be taken." "If, therefore, nothing more has been done in this case than has always been done by way of accommodation among merchants, the transaction was not usurious."

But he thinks that the discount of such a bill (for three years), even not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of usury; but coupled with the affair of the annuity and the bond, he thinks it appears to be a mere cloak for a

usurious loan. He admits it to be completely established that, on the discount of bills, a banker may deduct more than the legal interest upon the whole sum for the whole time if the excess be only a reasonable compensation for the expenses and trouble of remittance. He concludes by saying that the only question in such cases is, "whether it be a real discount in the way of trade, or a mere loan of money." In the case then before him he is clear that "it was not a discount in the way of trade, but was merely employed as the means of obtaining more than legal interest."

7. In the case of *Parr v. Eliason*, 1 East, 92, a bill which had thirteen months to run was discounted. The bankers took the full discount, but gave their own acceptance at three months for part, without deducting from the discount the interest for three months upon their own acceptance. This was holden to be usurious, because they did not pay the amount in cash, but gave their own acceptance at a distant day for part; it was not contended to be usurious, because the bankers deducted the interest upon the whole sum in the bill for the whole time it had to run, and no question of usury would have arisen if the amount had been paid wholly in cash.

8. The case of *Barclay qui tam v. Walmsley*, 4 East, 55, where the acceptor of a bill discounted his own acceptance at eighteen days, deducting at about the rate of sixty per cent. per annum. This was not usury.

These cases satisfy my mind that in England a case of mercantile discount, by way of anticipation of funds, is not a case of loan within their statute; and they are a strong confirmation of the general principles of law and reason which I have before mentioned. Principles in themselves so strong, and so universally adopted as not to have been once questioned in a nation so commercial as that of England, are not to be easily shaken. In a country adopting the same law of usury, and the same principles of commercial law, the same principles of law and reason must equally apply.

If, then, in this country as well as in England a case of mercantile discount, by way of anticipation of funds, be not within the statute of usury, the question arises, is the case at bar a case of mercantile discount by way of anticipation of funds within the meaning of the charter of the bank?

It would be difficult in practice for a bank to know whether a note or a bill offered for discount be a note or bill grounded upon a *bona fide* mercantile negotiation of sale or contract. If the right of the bank to recover upon a bill or note discounted were to depend upon their being able to prove at the trial that the bill or note was given for a real debt, they would have a very hopeless business. They would be liable to continual impositions, and even although the paper might have been founded upon a real transaction, the parties might so conceal or remove the evidence as to render it impossible for the bank to succeed. Again, if the bank was obliged to investigate nicely every transaction before they could safely discount a note or bill, it would be almost impossible for them to transact any business at all. The burden of proof must in reason rest upon the other party. It is sufficient for the bank that the paper offered bears the form and appearance of a mere mercantile negotiation.

Nor do I deem it necessary within the spirit of the charter of the bank that a note to be lawfully discounted by the bank should be a note given in consequence of an actual sale of property. If one merchant chooses to give a credit to another (whether gratuitously or in consideration of a commission or other compensation), by accepting bills, or drawing or indorsing notes payable at a distant day; such credit may strictly, in mercantile language, be called funds;

and the discount of such acceptances, or such notes, is as much the anticipation of funds as if the acceptances or notes were founded upon an actual sale of property. Again, if I have sold property, either verbally or by covenant under seal, the contract is not in such a form as to be the subject of discount. I get a friend who has confidence in that fund to accept my bills, or to indorse my notes, so as to enable me to anticipate that fund. Such acceptances and such notes would be clearly within the spirit of the charter of the bank, and would be fairly within the meaning of a mercantile discount by way of anticipation of funds, and the discount of such acceptances, or notes, could not be considered as a loan from the bank to me. If it can in any way be considered as a loan, it must be a loan from my friend who enables me to get the money on his acceptances.

What then is the case presented to us by the replication? Does it bear the form and appearance of a mercantile negotiation, by way of anticipation of funds? It is simply a note for \$800 by R. B. J., and indorsed by W. Herbert, payable at sixty days after date. The note in every respect has the usual appearances of a fair transaction, and there is no fact stated to show that it was not. The bank then had a right to presume it was so, and the court must so consider it until the contrary appears. Considering it then as a case of mercantile discount by way of anticipation of funds, I deem it a case clear of the statute of usury, and within the charter of the bank.

But an objection is made and strenuously insisted upon by the counsel of the defendant, that even if the bank has a right to deduct a discount at the rate of six per cent. per annum, upon the face of the note for the whole time it has to run, yet they have agreed by this note to take more than at that rate. It is said that \$8.40 upon \$800 is at the rate of six per cent. per annum for sixty-three days and six-tenths of a day, and they make it out by saying that sixty-three days is not two months and one-tenth of a month, but is sixty-three three hundred and sixty-fifths of a year, that is, they do not allow that a month is to be considered as the twelfth part of a year, nor a day the thirtieth part of a month. The replication avers that \$8.40 for the discount of a note of \$800 is at the rate of six per cent. per annum, and whether it be or not I take to be a matter of fact for the jury and not for the court. It is for the jury to say what is the usual mode of calculation in such cases, and to calculate accordingly. If, however, it were a matter of law and not a matter of fact, I should most certainly calculate it according to the mode in which the clerks in the bank calculated it, because I know that to be the general, I may almost say the universal, mode of calculation, not only among bankers and merchants, but in our courts of justice. But if it were an error, I should leave it to the jury to say whether it were not a mistake, and not done with an intent to make more than the lawful discount.

Upon these grounds, I am satisfied that the transaction in the replication is not usurious, nor the note void. Judgment upon the demurrer for the plaintiff.

§ 334. *In general.*—Where the interest contracted for is the highest allowed by statute it may still be made payable at periods of less than one year. *Meyer v. City of Muscatine*, 1 Wall., 384.

§ 335. To constitute usury there must be a loan in contemplation by the parties. *Nichols v. Pearson*, 7 Pet., 103 (§§ 530-31).

§ 336. To constitute usury there must either be a loan and the taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due. *Hogg v. Ruffner*,\* 1 Black, 115.

§ 337. Usury consists in taking an interest for money above that allowed by law. *Dill v. Ellicott*, Taney, 233 (§§ 544-47).

§ 338. It is not usury, where the writings are not executed at the time of the contract, to charge interest from that date. *United States v. Williams*, 5 McL., 183.

§ 339. There must be a loan and the taking of more than legal interest, or the forbearance of payment of a pre-existing debt, upon a contract, for illegal interest, to constitute usury. *Moncure v. Dermott*,\* 13 Pet., 345.

§ 340. Whenever the real object of a contract is the loan of money at a greater rate of interest than the law allows, it will be deemed usurious. *Lloyd v. Scott*,\* 4 Cr. C. C., 206.

§ 341. To constitute usury there must be a loan express or implied — an understanding that the money lent shall or may be returned, and that a greater rate of interest than is allowed by law shall be paid. *Lloyd v. Scott*, 4 Pet., 205 (§§ 436-40).

§ 342. The intent with which the act is done is an important ingredient in the offense of usury. Ignorance of the law will not protect the party from its penalties where it is committed; but where there is no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to be the result of mistake or accident, no penalty attaches. *Ibid*.

§ 343. To make a loan usurious there must be an intent on the part of the lender to take more than the legal rate of interest. Doubtless, in general, the intent of an agent acting within the scope of his authority may be imputed to the principal. But if an agent in good faith makes a loan for another, and, without the knowledge or authority of his principal and for his (the agent's) own benefit, exacts more than legal interest, the loan is not thereby rendered usurious. In such a case the law does not impute the knowledge and intent of the agent to the principal. It makes no difference whether the agency is general or special; nor that the agent fails to disclose his principal and takes the note in his own name. This does not make the agent the lender. *Palmer v. Call*, 2 McC., 522 (§§ 524-26).

§ 344. Question of fact — Of law. — Whether more than the legal rate of interest has been contracted for in any case is a question of fact to be collected from the whole transaction as it passed between the parties. *Missouri Valley Life Ins. Co. v. Kittle*, 1 McC., 234 (§§ 447-48).

§ 345. It is the duty of the court to construe a written instrument which exhibits a usurious contract. And this, whether the usury is charged directly or indirectly. *Buttrick v. Harris*, 1 Biss., 442 (§§ 434-35).

§ 346. The court may decide an instrument or contract to be usurious upon its face, but it cannot look to anything outside of the instrument. *Lloyd v. Scott*,\* 4 Cr. C. C., 206.

§ 347. The construction of a written instrument is exclusively for the court, and it is for the court to say whether a written contract is usurious. If the contract upon its face discloses a case of usury, the jury are not allowed to infer from its extrinsic facts showing the contract not to be within the act. *Levy v. Gadsby*,\* 3 Cr., 180.

§ 348. Exchange. — It is not usury in a bank which has power by its charter to deal in exchange to charge the market rates of exchange upon time bills. *Buckingham v. McLean*, 13 How., 150.

§ 349. The law of Wisconsin prohibited all corporations and persons from taking directly or indirectly any greater sum for the loan or forbearance of money than twelve per cent. Held, that a note payable at Milwaukee with interest at the rate of twelve per cent. per annum, with exchange on Boston on principal and interest not exceeding one per cent., was usurious on its face, and that, in the absence of any proof, the mere fact that the payee's residence was near Boston would not relieve him of the imputation of indirectly contracting for a greater profit on the loan than the law allowed. *Buttrick v. Harris*,\* 3 Am. L. Reg. (N. S.), 112.

§ 350. There is no usury in charging exchange on a bill in Indiana payable in New York. *Orr v. Lacy*, 4 McL., 243.

§ 351. Discount — Interest for sixty-four days on sixty-day notes. — The Bank of the United States and every other bank not restrained by its charter, and also private bankers, on discounting notes and bills, have a right to deduct the legal interest from the amount of the note or bill, at the time it is discounted. *Fleckner v. Bank of the United States*, 8 Wheat., 338.

§ 352. A sale of an indorsed negotiable note, for flour, and a sale of the flour for an amount in cash, less than the value of the note after deducting the discount for the time it had to run, is not usurious. *Riddle v. Mandeville*, 1 Cr. C. C., 95.

§ 353. It is not usury in a bank to take the discount for sixty-four days upon a sixty-day note. *Union Bank of Georgetown v. Gozler*, 2 Cr. C. C., 349.

§ 354. In a suit by a national bank upon drafts payable in another state and discounted by it, where the defense of usury was set up, it was held that, in the absence of any proof as to the rate of exchange, the plaintiff must recover. *Wheeler v. National Bank*, 6 Otto, 268.

§ 355. It is not usurious in discounting a note to take out interest in advance at the highest rate allowed by statute. *Second National Bank v. Smoot*,\* 2 MacArth., 371.

§ 356. If it was the custom and usage of banks and exchange-brokers in that part of the country where the note was made and indorsed to discount such paper at one per cent. for sixty days, and to charge an additional premium of from a half of one per cent. to one per cent. for exchange on eastern paper, when such paper was loaned, and to charge the like discount and premium for the renewal of the notes given therefor, such a transaction, if *bona fide*, and not intended as a cloak for usury, is not usurious. *Bradley v. McKee*, 5 Cr. C. C., 296.

§ 357. If a bank discounts a note made payable directly to the bank, and takes the interest in advance for the time the note has to run, it is not usury, such being proved to be the usage of banks. *Union Bank of Georgetown v. Corcoran*, 5 Cr. C. C., 518.

§ 358. It is not usury for a bank in Washington to loan money and take the note directly to itself, deducting the interest in advance, such being the usage of the banks. *Bank of the Metropolis v. Moore*, 5 Cr. C. C., 518.

§ 359. A discount on a bill on which exchange is charged to take up a previous bill is not usurious unless it be shown that such an agreement was made at the discount of the first bill. *McLean v. The Lafayette Bank*, 3 McL., 587.

§ 360. Where a bank agrees to pay the face of its bills there can be no usury. *Lafayette Bank v. State Bank of Illinois*, 4 McL., 208.

§ 361. To constitute usury there must be a corrupt loan of money; hence a purchase of notes of a bank or of individuals, at a discount, is not usury. *Ibid.*

§ 362. It is not usury to take sixty-four days' discount on a note payable at sixty days. *The Bank v. Crabb*,\* 2 Cr. C. C., 299.

§ 363. Discounting a note at six per cent., and giving post notes, having time to run, without interest, held usurious. *The Bank v. Gaither*,\* 3 Cr. C. C., 440.

§ 364. Where a draft at sixty days was discounted at the usual bank discount at sixty-four days, and two and a half per cent. commission, and was taken up by a new draft at forty-five days, which was discounted at the same rate and commission, held, that the transaction was usurious. *Nicholls v. Wright*,\* 4 Cr. C. C., 700.

§ 365. Banks are within the statute of usury. But the taking of interest in advance upon the discount of notes in the usual course of business by a bank is not usury. *Thornton v. Bank of Washington*,\* 3 Pet., 36.

§ 366. The taking of interest for sixty-four days is not usury, if the note, according to the custom and usage of the place, is not due till the sixty-fourth day. *Ibid.*

§ 367. That there have been successive renewals of a note on the sixty-third day, and the money credited on that day, and the interest taken for sixty-four days each time, the notes according to custom not being due and payable until the sixty-fourth day, does not necessarily create usury. The court will not infer usury from the transaction. *Ibid.*

§ 368. It is the settled law in Virginia that the *bona fide* purchaser of a bond or note may take it at any rate of discount, however great, without violating the statute against usury. *Moncure v. Dermott*,\* 13 Pet., 345.

§ 369. The discounting by a bank at a higher rate of interest than the law allows of accommodation paper, made and given to the holder for the purpose of raising money upon it, in its origin only a nominal contract, on which no action could be maintained by any of the parties to it if it had not been discounted, is usurious and not defensible as a purchase. Whether there is an exception to this rule where the purchaser takes in good faith of the holder, without knowledge of the origin of the paper, and in the belief that it has been created in the usual course of business, *quære*. *Tiffany v. Boatman's Institution*, 18 Wall., 375 (§§ 572-79).

§ 370. Where the defendants had received a note in a fair transaction, and took it to the plaintiff and had it discounted at an unlawful rate of interest, with the understanding that they were not to be responsible upon their indorsement, it was held that the contract was usurious. *Nicholls v. Fearson*,\* 2 Cr. C. C., 703.

§ 371. It is usury to take two and a half per cent. commission, besides the usual bank discount, on a draft at forty-five days to renew a life draft which had been discounted by the plaintiff at the same rate, and which had been drawn to raise money upon, and had become payable to the plaintiff. *Nicholls v. Wright*, 4 Cr. C. C., 700.

§ 372. Compound interest.—Under the laws of Montana compound interest is not allowed though stipulated for, and a contract agreeing to convey on payment of a certain sum with compound interest was ordered to be performed on payment of the principal and simple interest. *Wilson v. Davis*,\* 1 Blake (Montana), 183.

§ 373. Where interest on a note is payable annually it is not usurious to add it to the amount of the note and compute interest on the whole. *Oliver v. Decatur*,\* 4 Cr. C. C., 461.

§ 374. If interest is, by agreement, payable annually, it is not usury to add it to the principal, at the end of the year, and take a new note for the whole, bearing interest. *Ibid.*

§ 375. As to third parties.—Where usury is averred to have taken place between A. & Co. and B., in a loan of money and a sale of goods, if B. afterwards sell the same goods to C., the latter cannot take advantage of such usury. *Simpson v. Wiggin*, 3 Woodb. & M., 413.

§ 376. The plea of usury, at least as to landed security, is personal and peculiar; and however a third person having an interest in the land may be affected incidentally by a usurious contract, he cannot take advantage of the usury. A purchaser of the equity of redemption, where there is a mortgage to secure a usurious loan, cannot avail himself of the plea. *De Wolf v. Johnson*, 10 Wheat., 367 (§§ 460-67).

§ 377. Subsequent valid contract.—Although a contract be usurious in its inception and void at law, a subsequent contract freeing the loan from the taint of usury will make it valid. *Ibid.*

§ 378. New security.—Complainants were assignees of a usurious note who took it without notice of the usury. But after receiving notice of it they procured a confession of judgment on the note and took a mortgage to secure the judgment, without remitting the unlawful interest. *Held*, that the transaction was still subject to the defense of usury. *Morgan v. Tipton*,\* 3 McL., 399.

§ 379. Where a new security is substituted for a usurious note, and the new security retains the usury, it is as fatally infected with the vice as the original instrument. *Ibid.*

§ 380. Extension of time.—In Michigan the payment of a sum of money for an extension of time on a note is a good consideration for the extension, though such payment is usurious. *Vary v. Norton*, 6 Fed. R., 808.

§ 381. Whether a further forbearance after the debt is due constitutes a valuable consideration must depend upon the validity of the demand. Thus, where the contract is void for usury, a further forbearance is not a valuable consideration making the contract good. *Morgan v. Tipton*,\* 3 McL., 399.

§ 382. A contract must be usurious at the time it is entered into or it cannot become so by any future contingency. The corrupt intent must be apparent on the face of the contract, or at least it must contain all the elements to make it usurious. *York Bank v. Asbury*, 1 Biss., 290.

§ 383. A contract which is unaffected with usury in its inception can never be invalidated by any subsequent usurious transaction. *Nichols v. Fearson*, 7 Pet., 103 (§§ 530-31).

§ 384. If a bond or note is free from usury in its inception no subsequent transactions with other parties can make it invalid. *Moncure v. Dermott*,\* 13 Pet., 345.

§ 385. Indorsement as collateral.—Where the holder of a valid note made by a third person indorsed it as collateral security for a usurious loan, it was held that the usury rendered the indorsement void and prevented the indorsee from maintaining an action thereon against the maker, notwithstanding the usurious loan secured by it had been paid. *Gaither v. Farmers' & Mechanics' Bank of Georgetown*,\* 1 Pet., 37.

§ 386. Consideration good in part and bad in part.—At the request of one of its debtors, a national bank agreed to extend the time of payment on a note in consideration of a payment in advance of usurious interest and of the absolute indorsement to it, before due, of a certain note held by the debtor. *Held*, that though the consideration for the extension was in part good and in part bad, yet that which was good would be sustained, and that the transfer to the bank of the note by indorsement was valid and made the bank a holder for value; also, that as the national banking act does not declare a contract void for usury, but simply provides that the interest shall be forfeited, it would be imposing a penalty not prescribed by law, if the court were to declare the transfer to the bank void. *Oates v. National Bank*, 10 Otto, 240.

§ 387. Contract to do work and receive pay in bonds; loan.—A canal company in embarrassed circumstances made a contract with V. by which he was to do certain work, and receive in payment certain bonds of the company, which in terms provided that they were a lien on the property of the company, and it was agreed that if the bonds were not delivered paid, V. might have a receiver appointed. *Held*, that though the work was only estimated to cost one-half of the face of the bonds, and though the company, in an action for the appointment of a receiver, charged that the arrangement with V. was only a cover for a loan, and that having made one hundred per cent. profit the transaction was usurious, yet the court held that as there was no loan there could be no usury, and that as no fraud or overreaching was shown the contract was valid and would be enforced as made. *White Water Valley Co. v. Vallette*, 21 How., 420.

§ 388. Interest after maturity of note.—Under the laws of Montana an agreement in a note that interest shall be paid after the maturity of the note at the rate of four per cent. per month is valid. *Davis v. Hendrie*,\* 1 Blake (Montana), 499.

§ 389. No forbearance, no usury.—The contract prohibited by the statute of usury in Virginia is a contract to receive something for forbearance; that is, for forbearing to enforce

some debt or right; and unless there was a right to demand payment, there could be no forbearance; and if no forbearance, no usury. *Lloyd v. Scott*, \* 4 Cr. C. C., 206.

§ 390. **Profit uncertain.**—It is essential to the nature of usury in Indiana that a certain gain, exceeding the legal rate of interest, should accrue to the lender as a consideration for the loan. Where there is no loan there can be no usury. Where there is a loan, although the profit to be derived by the lender exceeds the legal rate, yet if that profit is uncertain or contingent, the contract, if *bona fide*, and without any design to evade the statute, is not usurious. *White Water Valley Co. v. Vallette*, 21 How., 414.

§ 391. Where a promise to pay a sum in excess of legal interest is contingent and dependent upon the happening of an uncertain event, the loan is not usurious, especially where the contract is so curious and uncertain that it cannot be inferred that it was designed as a device to cover usury. *Spain v. Hamilton*, 1 Wall., 604.

§ 392. **Burden of proof.**—Where usury is set up as a defense to the foreclosure of a mortgage which is legal in form and has all the evidence of authenticity required by law, the defendant is put upon his proof to maintain his defense. *De Wolf v. Johnson*, 10 Wheat., 867 (§§ 460-67).

§ 393. **Commissions of broker.**—It is not usury for a broker or agent to charge the usual and customary commissions for his services in purchasing a ship, and also to take legal interest on his own moneys advanced towards the purchase, unless it be proved that the commissions were intended by the parties as a means and cover for reserving more than legal interest upon the loan. *The Ship Panama, Olc.*, 348.

§ 394. **Judgments.**—Under the laws of Oregon the rate of interest upon judgments rendered therein cannot be varied by stipulations of the parties, and an agreement that a judgment shall bear interest at a rate in excess of that prescribed is simply void and does not render the judgment usurious. *In re Fuller*, 1 Saw., 243.

§ 395. **Corporations.**—A statute of a state providing that corporations shall not interpose the defense of usury does not apply to accommodation indorsers for corporations. *Market Bank v. Smith*, \* 7 Am. L. Reg. (O. S.), 667.

§ 396. **Quere:** Whether a contract by a corporation for a rate of interest in excess of that allowed by law is void? In any event it is held that the surplus interest paid should be credited to the debtor as not collectible. *Ibid.*

§ 397. By the law of New York, passed April 6, 1850, no corporation is allowed to interpose the defense of usury. *Railroad Company v. Bank of Ashland*, \* 12 Wall., 226.

§ 398. By the law of Ohio, passed December 15, 1852, any railroad company authorized to borrow money and to execute bonds or promissory notes therefor was authorized to sell such bonds or notes at such times and in such places, either within or without the state, and at such rates and for such prices, as in the opinion of the directors might best advance the interests of the company. This is tantamount to a repeal of the usury laws as to such companies. And although it has primary reference to the railroad companies of Ohio, it extends by comity to railroad companies of other states borrowing money in Ohio, especially when made Ohio corporations and authorized to do business in that state. *Ibid.*

§ 399. **In bankruptcy.**—A claim void under the state statutes of usury will not be allowed in a court of bankruptcy against the estate of a bankrupt. *In re Pittock*, 8 N. B. R., 78. See §§ 540-43.

§ 400. **Waiver.**—A bare promise to pay a usurious debt, or a partial payment of it, will not take the contract out of the statute against usury. No subsequent confirmation nor new contract stipulating to pay the debt with usurious interest will make it valid, or prevent the debtor from pleading usury. *Moncure v. Dermott*, \* 13 Pet., 345.

§ 401. In the purchase of a rent charge, the fact that the annuity may produce a higher rate of interest than the lawful rate upon the consideration paid for it does not make a case of usury; nor does a condition in the contract giving the vendor an option to repurchase the rent by paying the original consideration after the lapse of a certain time. The inadequacy of price, and the right to repurchase, are circumstances for the consideration of the jury. But it is otherwise if the transaction is not a *bona fide* purchase of a rent charge, but in substance a loan, with a separate obligation on the part of the vendor to repay the principal amount. *Lloyd v. Scott*, 4 Pet., 205 (§§ 436-40).

§ 402. S. wanted to raise money and M. wanted to invest in a permanent and productive fund. S., therefore, in consideration of \$5,000, bargained and sold by deed to M. an annuity or rent of \$500 in fee, charged upon certain houses and lots, with a right of distress, and of entry and eviction, in case the rent should be in arrear; S. covenanted to pay the rent and keep the houses insured; and M. covenanted that if at any time after five years S. should pay M. the sum of \$5,000 with all arrears, M. should execute a release of the rent; but there was no obligation on S. to refund the money, and there never was a time when the \$5,000 was a

debt due by S. to M. It was held that there could therefore be no forbearance of the amount, and the transaction was not a loan and not usurious. *Lloyd v. Scott*,\* 4 Cr. C. C., 206.

§ 403. Where the grantor of an annuity by deed has conveyed all his interest in the property charged with the annuity, and an allegation of usury in the granting of the annuity is afterwards made, he may be a witness to prove usury, if he is not a party to the suit, and has conveyed all his right and title to the property to others, his creditors, thus divesting himself of all interest arising out of the original agreement, and is released from his debts by them, and is not liable to the costs of the suit. *Scott v. Lloyd*, 12 Pet., 145.

§ 404. Miscellaneous.—An agreement by a railway company to apply the excess of interest under a usurious contract in a certain way cannot constitute a lien upon the property as against subsequent purchasers. *Sullivan v. Portland & Kennebec R. Co.*, 4 Cliff., 212.

§ 405. An agreement by a stockholder of a building and loan association, who has received a portion of the value of his shares in advance, to pay \$1 per month on each share is not usurious, because the money received is not a loan; but the agreement is a purchase of the stock, and the payments are payments of the purchase money. *Pabst v. Trustees of Economical Building Association*,\* 1 MacArth., 385.

§ 406. A contract conveying personal property for a certain sum, which provided that the grantor could have the property returned to him on paying the purchase money with interest thereon at the rate of two and one-half per cent. per month, is, under the laws of the District of Columbia, usurious upon its face, and is valid only as to the money actually advanced. *Starkweather v. Prince*,\* 1 MacArth., 144.

§ 407. A court of equity will not order a mortgagee to account for the purpose of charging him with a statutory penalty for taking usurious interest. *Bowen v. Kendall*,\* 23 Law Rep., 588.

§ 408. If A. proposes to sell to B. a tract of land for \$10,000 in cash, or for \$20,000 payable in ten annual instalments, and if B. prefers the larger sum to gain time, the contract cannot be called usurious. On the dissolution of a partnership between A. and B. for dealing in lands, B. agreed to pay a certain sum to A. for release of his interest in the land, and gave him his obligations. Afterwards, in extinguishment of these obligations, which he was unable to meet, B. agreed to reconvey to A. certain tracts of the land, but afterwards refused to deliver possession. A proposition was then made by A. to release all his interest in the lands of the firm to B. upon payment in cash of the amount advanced by him, and this amount was ascertained by calculation to be about \$20,000. B. being unable to comply with this proposition, it was not accepted. Proposals were then made to purchase for a larger consideration the lands, and also certain farming stock on a credit running ten years. On these terms A. demanded \$40,000 and B. offered \$38,000, and finally the amount of \$38,000, payable in ten annual instalments, was agreed upon. It was held that there was no usury in the transaction. *Hogg v. Ruffner*,\* 1 Black, 115.

§ 409. The plaintiff, through the defendant as his agent, sold \$1,000 of eight per cent. stock of the United States. The defendant received the money and applied it to his own use. Being pressed for payment, it was agreed that the defendant should be considered as answerable for the stock, and should give a mortgage to secure its repayment and eight per cent. interest. The court declared the contract to be usurious and the mortgage to be void, considering it as a loan of money and not of stock. *De Butts v. Bacon*,\* 6 Cr., 252.

§ 410. Where a bill is drawn, accepted, and indorsed, and negotiated by a broker at five per cent. a month, the transaction is usurious. *Gaither v. Lee*,\* 2 Cr. C. C., 205.

§ 411. If a security founded upon a prior one be fatally tainted with usury, and the prior one was free from usury, but was given up and canceled, and the latter one is thereafter adjudged void, the prior one will be revived in equity, and may be enforced as if the latter one had not been given. It is a rule in equity that an incumbrance shall be kept alive or extinguished as shall most advance the justice of the case. *Burnhisel v. Firman*, 22 Wall., 170.

§ 412. A demand for the return of money paid as usury is not canceled by the subsequent repeal of the usury law. *Whitaker v. Pope*,\* 2 Woods, 463.

§ 413. When usury has been specially pleaded and the evidence adduced to support such plea has been adjudged by the court to be inapplicable to the facts so pleaded, the same evidence may be admitted upon the plea of *non-assumpsit*, if applicable. *Levy v. Gadsby*,\* 3 Cr., 180.

§ 414. A contract of loan for six per cent. interest, when the law allowed only five, is clearly usurious; but where the person who betrays the lender into such a contract is his agent, it would be against good conscience that the borrower should derive any advantage to himself, prejudicial to the lender, from this circumstance, and the lender is entitled to legal interest. *Short v. Skipwith*, 1 Marsh., 103.

§ 415. Miss James and Miss Dermott were principals in a bond due P. for a debt due by Miss



Dermott alone. Negotiations were had between the latter and one Alexander to obtain money to pay off this obligation. Miss James gave her note to Miss Dermott to be used for this purpose, and the latter agreed under seal with the former binding herself to pay the note and the interest thereon as it fell due. This note was assigned to Alexander by Miss Dermott and he agreed to discharge and did discharge the bond to P. Alexander was secured by mortgage upon property of Miss James, and the matter was so arranged that he received twelve per cent. interest, which was usury under the local law. Suit was brought by the executors of Miss James upon the undertaking of Miss Dermott to discharge the note assigned to Alexander, and the usury in the loan by Alexander was set up in defense. The court refused to instruct the jury that the alleged usury could not be set up by the defendant, and that the plaintiffs could recover if they and their testatrix had no knowledge of the alleged usury at the time of the payments by them on the note assigned to Alexander, but gave other instructions upon which the defense of usury was successful. [This ruling of the court was reversed in 13 Peters, 345.] *Moncure v. Dermott*, \* 5 Cr. C. C., 446.

§ 416. A., owing B. \$2,210.24, gave him two notes at three and six months, amounting to \$2,707.49, the difference, \$497.25, being counted as interest, A. agreeing at the time that he was receiving that amount of interest for B.'s money. *Held*, that the contract was usurious. *Levy v. Gadsby*, \* 1 Cr., 180.

§ 417. Under the law of Pennsylvania of 1823 against usury, the lender of money at a greater rate of interest than six per cent. cannot recover more than the sum actually lent with lawful interest; and it is for the plaintiff to show the actual amount loaned where he has purchased checks delivered by the defendant in blank to be filled up by one for his accommodation to raise money upon, and where evidence has been given that the defendant has received only a certain amount for checks for a larger sum. *Hill v. Scott*, \* 5 Cr. C. C., 523.

## II. ATTEMPT TO EVADE THE LAW.

**SUMMARY**—*Contingent benefit*, § 418.—*Extrinsic circumstances*, § 419.—*In case of loans*, §§ 420, 421.—*Interest reserved*, §§ 422, 423.—*The intent*, § 424.—*Evasions*, § 425.—*Exchange*, § 426.—*Purchase of an annuity*, §§ 427-429.—*Payment of premium on life insurance policy in addition to interest*, § 430.—*Loan of depreciated notes*, §§ 431, 432.—*Shares of stock taken at an inflated price*, § 433.

§ 418. Upon a contract for the loan of money the lender is not at liberty to stipulate even for a contingent benefit beyond the legal rate of interest, if by the terms of the agreement he has a right to the repayment of the money loaned with the legal interest thereon at all events. A stipulation even for a chance of advantage beyond the legal interest is illegal. *Buttrick v. Harris*, §§ 434-35.

§ 419. If usury does not appear upon the face of a written instrument, the real corruptness of the contract must be shown by extrinsic circumstances which prove its character. Those circumstances must be viewed in connection with the contract. An instruction which asks the court to separate the instrument from its circumstances should not be given. *Scott v. Lloyd*, §§ 441-46.

§ 420. To constitute the offense of usury there must be a loan upon which more than the legal rate of interest is to be received. And where the contract is in truth for the borrowing and lending of money, no form which can be given to it will free it from the taint of usury, if more than legal interest be secured. *Ibid*.

§ 421. A profit or loss imposed upon the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, is always adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest. *Bank of United States v. Owens*, §§ 440-51.

§ 422. A statute forbidding the taking of more than a specified rate of interest applies also to a case where the interest has been only reserved and not received. Reserving must be implied in the word taking, since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. But it is necessarily otherwise in those cases in which courts are called upon to inflict a penalty upon the lender; then the actual receipt is generally necessary to consummate the offense. *Ibid*.

§ 423. In the construction of statutes of usury, there is a material distinction between the taking and the reservation of usurious interest. The reservation of usurious interest makes the contract utterly void; but if the usurious interest be not stipulated for, but only taken afterwards, the contract is not void and the party is only liable to the penalty for the excess. *Bank of United States v. Waggoner*, §§ 452-59.

§ 424. To constitute usury within the prohibitions of the usury law there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; the intent is apparent. But where the contract on its face is for legal interest only, it must be proved that there was some corrupt agreement or device or shift to cover usury, and that it was in the full contemplation of the parties. *Ibid.*

§ 425. Usury is a moral taint wherever it exists and no subterfuge can conceal it from the eye of the law. *DeWolf v. Johnson*, §§ 460-67.

§ 426. If a charge for exchange is a cover for usury the contract is void. The law of Wisconsin prohibited the taking of more than twelve per cent. as interest either directly or indirectly. A resident of Boston having money in Wisconsin loaned it in the latter state and took a note payable in Milwaukee in that state, with twelve per cent. interest and with exchange on Boston at one per cent. *Held*, that the loan was usurious. *Buttrick v. Harris*, §§ 434-35.

§ 427. The purchase of an annuity or rent-charge, if a *bona fide* sale, is not usurious, though a profit greater than the legal rate of interest be secured; but otherwise, if the real nature of the transaction is a loan bearing more than legal interest. An express stipulation for the repayment of the sum advanced is not indispensable to the existence of usury in such a case. Nor does it seem to be decisive that the transaction began with an application for a loan. It is proper to submit the case, with all its circumstances, to the consideration of the jury, and leave to them the question whether the contract was in truth a loan or the *bona fide* purchase of an annuity. *Scott v. Lloyd*, §§ 441-46.

§ 428. Where a contract in the form of a rent-charge is alleged to be a usurious loan, the court, after instructing the jury to consider all of the circumstances of the contract together, ought not to give an instruction which seeks to separate the circumstances of the case from each other and say that no one of them amounts in itself to usury. *Ibid.*

§ 429. A usurious loan in the form of a purchase of a rent-charge is void, even as against one purchasing the land charged with the rent. *Lloyd v. Scott*, §§ 436-40.

§ 430. An insurance company chiefly engaged in loaning money was applied to for a loan, the applicant not desiring any policy of insurance upon his life. He was informed that the company would loan him the amount (\$2,500) provided he would take from the company a policy of insurance upon his own life or that of some other person for \$5,000, and pay the premiums amounting to about \$300 per annum. The mortgage securing the loan provided as follows: "And the parties of the first part hereby agree, in consideration of the aforesaid loan, to take out and keep in force during the continuance of said loan, a policy of life insurance in the Missouri Life Insurance Company aforesaid, upon his own life or the life of some other person, and upon which he hereby agrees to pay or cause to be paid to said company the annual premium thereon, and not less than \$302 per annum. And it is further agreed in consideration of said loan that all renewals thereof, or extensions of time of payment thereof, are upon the express condition of the payment upon said life insurance policy being made when due; . . . that any neglect or refusal to so do shall cause the whole amount of said loan to become immediately due and payable, any agreement of renewal or extension of payment to the contrary notwithstanding." It was held that the contract of insurance was demanded as a condition precedent to, and an additional consideration for, the loan asked; and as the highest legal rate of interest had been otherwise contracted for and reserved, the agreement for additional compensation for the loan rendered it usurious. *Missouri Valley Life Ins. Co. v. Kittle*, §§ 447-48.

§ 431. In a plea to a suit upon a note the defendants averred that the note was made to enable one O. to obtain a loan of money from the plaintiff in the ordinary course of discount; that it was offered for discount and rejected, and that it was afterwards "unlawfully, usuriously and corruptly agreed by and between" the plaintiff and said O. that the latter should give a note payable in gold or silver for a loan of depreciated paper of the Bank of Kentucky; and that this was contrary to the fundamental articles of the corporation plaintiff and reserved a greater rate of interest than six per cent. Upon demurrer to this plea, it was held that it was sufficient, although it did not aver directly an intention to evade the statute nor a knowledge on the part of the plaintiff of the actual depreciation of the Kentucky notes, the confession of the *quo animo* implied in the demurrer being sufficient to affect the case with usury. *Bank of United States v. Owens*, §§ 449-51.

§ 432. The taking of a note bearing the highest legal rate of interest in exchange for bank notes of equal amount which are depreciated in the market is not *per se* usury. The question in such a case is whether there was any corrupt agreement, or device or shift to reserve or take illegal interest. *Bank of United States v. Waggener*, §§ 452-59.

§ 433. That shares of stock are taken at an inflated price in negotiating a loan instead of money will not necessarily make the contract usurious. The question always is whether the transaction was a subterfuge to evade the laws against usury. *De Wolf v. Johnson*, §§ 460-67.

[NOTES.—See §§ 468-487.]

BUTTRICK v. HARRIS.

(Circuit Court for Wisconsin: 1 Bissell, 442-446. 1864.)

STATEMENT OF FACTS.—Action upon a note given by defendants in Milwaukee, payable three years after date at the Marine Bank of said city, with interest at twelve per cent. per annum, the said interest payable semi-annually, with exchange on Boston on the principal and interest not exceeding one per cent. Plaintiff, it appeared, was a resident of the state of Massachusetts, near the city of Boston, and having collected money in Milwaukee through his agents, he loaned it to defendants, who thereupon gave him the note sued upon.

Opinion by MILLER, J.

The law of the state of Wisconsin, under which the contract was made, prohibited all corporations and persons from taking directly or indirectly any greater sum for the loan or forbearance of money than twelve per cent. And all notes or securities, whereby there was reserved or secured a rate of interest exceeding twelve per cent., were declared to be valid and effectual to secure the repayment of the actual sum loaned without interest. The present law of the state limits the rate of interest to seven per cent.

§ 434. *Stipulation for a chance of advantage beyond the legal interest is usurious and illegal.*

It is well settled that upon a contract for the loan of money the lender is not at liberty to stipulate even for a contingent benefit beyond the legal rate of interest, if by the terms of the agreement he has a right to the repayment of the money loaned with the legal interest thereon, at all events. 2 Parsons on Contracts, 403, 405; *Cleveland v. Loder*, 7 Paige, Ch., 557. A stipulation even for a chance of advantage beyond legal interest is illegal. Courts will not lend their aid to enforce an unlawful contract. A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest. It was conceded that exchange between Boston and Milwaukee was uniformly in favor of Boston. Reserving interest as discount is unlawful. *Bank of United States v. Owens*, 2 Pet., 527 (§§ 449-51, *infra*). A contract for the purchase of an annuity may be infected with usury. *Lloyd v. Scott*, 4 Pet., 205 (§§ 436-40, *infra*). And in a sale of land, if the lender takes more than legal interest for the forbearance of the debt, it is usury. *Hogg v. Ruffner*, 1 Black, 115. When a bank discounts a note with depreciated paper it is usury. *Gaither v. The Farmers' and Mechanics' Bank*, 1 Pet., 37.

§ 435. *A fair rate of exchange on foreign bills may be taken, if not contracted for as a mere cover for usury.*

A fair rate of exchange on foreign bills, according to current rates, may be received, but if more was intended to be taken, it is usury. And if a charge for exchange is a cover for usury, the contract is void. *Andrews v. Pond*, 13 Pet., 65, 80 (§§ 318-27, *supra*). It is not usury in a bank having the power by

its charter to deal in exchange to charge the market rate of exchange upon time bills. *Buckingham v. McLean*, 13 How., 150 (Dr. AND CR., §§ 2930-32).

The court says: "The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury is, that the former is a just and lawful compensation for receiving payment at a place where money is expected to be less valuable than at the place where it is advanced and lent. . . . The contract is not unlawful unless more than six per cent. has been reserved or taken for interest; if more has been reserved or taken, not for the loan and forbearance, but for a change in the place of payment, then the contract is lawful." In the case under consideration, the money was in Milwaukee, where it was advanced, and where the plaintiff agreed to receive it in the same funds, as to their par value, that he advanced, with the highest rate of interest, and one per cent. added. The note is not payable in Boston with exchange, but in Milwaukee.

In *Stevens v. Lincoln*, 7 Metc., 525, which was an action to recover usurious interest paid, it was conceded that a note made in the state of Massachusetts, and payable in the same state, with interest and exchange, was usurious. The exchange was considered a cover for usurious interest. The maker of two promissory notes, in order to obtain a renewal, gave a new note for the amount, paying the interest due and the discount, and, in addition, he transferred to the holder, at par, drafts on New York and Albany, worth three-fourths of one per cent. premium, to an amount equal to the debt. Being a transaction within the state of New York it was held to be usurious. *Seneca County Bank v. Schermerhorn*, 1 Denio, 133. In the *Bank of the United States v. Davis*, 2 Hill, 451, the same principle is recognized. The bank having discounted a bill of exchange on New York charged exchange in addition to the amount allowed by law. In the case of *The Oliver Lee & Co.'s Bank v. Walbridge*, 19 N. Y., 134, the note was made in the city of Buffalo, discounted at a bank of that city, and was made payable in the city of New York, with the purpose in the parties to enable the banker to realize a profit from a difference of exchange between Buffalo and New York; a majority of the court held that there was no usury in the contract, for the reason that the law recognized no difference in value in money within the state. But the evident inclination of the judges delivering opinions was to consider the contract usurious in principle. The supreme court of the state of Indiana, in *The State Bank v. Ensminger*, 7 Blackf., 105, and in *Mix v. Madison Insurance Co.*, 11 Ind., 117, adjudged notes similar to the note in this suit to be usurious. *Towslee v. Durkee*, 12 Wis., 480, establishes the principle in this state, that where the lender made a condition of a loan within the state that exchange on New York should be paid in addition to lawful interest, the contract was usurious.

The law of the place of the contract forbade the receiving or contracting for a greater amount of interest than twelve per cent., directly or indirectly. If a larger amount of interest than twelve per cent. were expressly reserved the contract may be pronounced usurious without further inquiry, as it is for the court to construe a written instrument, which exhibits a usurious contract. *Bank of the United States v. Waggener*, 9 Pet., 378 (§§ 452-59, *infra*); *Levy v. Gadsby*, 3 Cranch, 180; *Walker v. The Bank of Washington*, 3 How., 62 (§§ 328-29, *supra*). It is equally the duty of the court so to construe a written instrument, which exhibits an unlawful intent to contract for usury indirectly. There is no proof, in explanation of the reason, for making the note

payable with exchange. The note was thus drawn and signed. In the absence of proof on the subject the mere fact of the payee's residence being near Boston will not relieve him of the imputation of indirectly contracting for a greater profit on the loan than the law allowed, and that his case comes fully within the prohibition of the statute. I think the note is usurious on its face as a contract for a greater sum for the loan of money than twelve per cent. A usurious intent is inferable from the contract.

As the jury allowed interest in the verdict, a new trial will be granted, unless the plaintiff remits the excess over the principal of the note.

LLOYD v. SCOTT.

(4 Peters, 205-231. 1820.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—This is an action of replevin, brought to replevy certain goods and chattels which the defendant, as bailiff of William S. Moore, had taken upon a distress for rent claimed to be due upon certain houses and lots in Alexandria, owned and possessed by the plaintiff. The sum for which the distress was made is \$500. The declaration is in the usual form, and the damages are laid at \$1,000. The defendant filed his cognizance, in which he acknowledges the taking of the goods specified in the declaration, and states that a certain Jonathan Scholfield, being seized in fee of four brick tenements and a lot of ground in the town of Alexandria, by his indenture, dated the 11th of June, 1814, in consideration of \$5,000, granted, bargained and sold to William S. Moore one certain annuity or yearly rent of \$500, to be issuing out of and charged upon the said houses and ground, and paid to the said Moore, his heirs and assigns, by equal half yearly payments of \$250, on the 10th of December and on the 10th of June in each year forever thereafter, to have and to hold the said annuity or rent charged and payable as aforesaid, to the said William S. Moore, his heirs and assigns forever. It also states that the said Scholfield, for himself and his heirs and assigns, did, by the said indenture, among other things, covenant well and truly to pay to the said Moore, his heirs and assigns, the said annual rent of \$500, by equal half yearly payments, forever. And if the rent should not be paid as it became due, it should be lawful for the said Moore, his heirs and assigns, to make distress for it; that Moore was seized of the rent on the 11th of December, 1814, and has since remained seized thereof.

The cognizance further states that, on the 29th of October, 1816, the said Jonathan Scholfield, by his deed of bargain and sale, conveyed to Lloyd, the plaintiff, forever, certain tenements and lots of ground in the town of Alexandria, whereof the said four brick tenements and lot of ground were parcel, and subject to the rent-charge stated; that Lloyd has been seized ever since and possessed of the same; and that on the 10th of June, 1824, \$250, a part of the rent, was due, and on the 10th of December following, \$250, the balance of the annual rent, was due and unpaid, for which sums the defendant, as bailiff, levied a distress. The cognizance is concluded by praying a judgment for \$1,000, being double the amount of the rent in arrear.

Moore covenants in the deed that if Scholfield, his heirs or assigns, "shall, at any time after the expiration of five years from the date of the deed, pay to the said Moore, his heirs or assigns, the sum of \$5,000, together with all ar-

rears of rent, and a ratable dividend of the rent for the time which shall have elapsed between the half year day then next preceding and the day on which such payment shall be made, he, the said Moore, his heirs and assigns, will execute and deliver any deeds or instruments which may be necessary for releasing and extinguishing the rent or annuity hereby created, which, on such payment being made, shall forever after cease to be payable." Scholfield covenanted for himself, his heirs and assigns, that he would keep the buildings in repair, have them fully insured against fire, and would assign the policies of insurance to such trustee as Moore, his heirs or assigns, might appoint, that the money may be applied to the rebuilding of the houses destroyed by fire, or repairing any damage which they might suffer.

To this cognizance the plaintiff filed a special demurrer, which in the argument he abandoned, and relies upon the special pleas of usury. To each of the four pleas the defendant demurs specially, and assigns for causes of demurrer: 1. That the said pleas do not set forth with any reasonable certainty the pretended contract which is alleged to have been usurious, and do not show a usurious contract. 2. That they do not state the time the said pretended loan was made. 3. That they do not state the amount of interest reserved or intended to be reserved on the said pretended contract. 4. That they do not set forth any loan or forbearance of any debt. 5. That they neither admit nor deny the sale and conveyance of the premises charged with the annuity or rent to have been made by Scholfield to the plaintiff below. Upon these demurrers, the circuit court rendered judgment for \$1,000, the double rent claimed in the cognizance.

The plaintiff here prays a reversal of this judgment: 1. Because the deed which forms a part of the cognizance on its face shows a usurious contract. 2. Because the pleas set forth, with sufficient certainty, a usurious contract.

The statute of Virginia against usury was passed in 1793, and provides that no person shall take, directly or indirectly, more than \$6 for the forbearance of \$100 per annum; and it declares that all bonds and other instruments for a greater amount of interest shall be utterly void.

In support of the demurrer, it is argued that the pleas are defective, as they do not contain any allegation of facts which amount to usury, and that the decision must turn on the construction of the contract between Scholfield and Moore. And it is contended that, although usury appears from the face of a deed, yet advantage can only be taken of it by plea; that the obligee may explain the contract by showing a mistake in the scrivener or a miscalculation of the parties. In *Comyn on Usury*, 201, it is laid down that, in an action on a specialty, though it appear on the face of the declaration that the bond, etc., is usurious, still no advantage can be taken of this, unless the statute be specially pleaded. 3 *Salk.*, 291; 5 *Coke*, 119; *Chitty on Contracts*, 240; 1 *Sid.*, 285; 1 *Saund.*, 295a. The decision of this point is not necessarily involved in the case.

#### § 436. *Requisites of a usurious transaction.*

The requisites to form a usurious transaction are three: 1. A loan either express or implied. 2. An understanding that the money lent shall or may be returned. 3. That a greater rate of interest than is allowed by the statute shall be paid.

§ 437. *Where a contract is usurious by an honest mistake or accident, the penalty will not attach.*

The intent with which the act is done is an important ingredient to consti-

tute this offense. An ignorance of the law will not protect a party from the penalties of usury, where it is committed; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches.

At an early period in the history of English jurisprudence, usury, or, as it was then called, the loaning of money at interest, was deemed a very high offense. But since the days of Henry VIII., the taking of interest has been sanctioned by statute.

In this country some of the states have no laws against taking any amount of interest which may be fixed by the contract. The act of usury has long since lost that deep moral stain which was formerly attached to it, and is now generally considered only as an illegal or immoral act because it is prohibited by law. Assuming the position that the pleas contain no averments which extend beyond the terms of the contract, the counsel in support of the demurrers have contended that no fair construction of the deed will authorize the inference that it was given on a usurious consideration. It was the purchase of an annuity, it is contended; and though the annuity may produce a higher rate of interest than six per cent. upon the consideration paid for it, yet this does not taint the transaction with usury.

If the court were limited by the pleas to the words of the contract, and it purported to be a purchase of an annuity, and no evidence were adduced giving a different character to the transaction, this argument would be unanswerable. An annuity may be purchased like a tract of land or other property, and the inequality of price will not, of itself, make the contract usurious. If the inadequacy of consideration be great, in any purchase, it may lead to suspicion; and, connected with other circumstances, may induce a court of chancery to relieve against the contract.

§ 438. *A bona fide purchase of an annuity, though the same amount to more than the legal interest on the purchase money, and though the vendor have the right to repay the purchase money, and extinguish the annuity thereby, is not usurious; but if such a contract is a mere device to cover up a loan, it is usurious.*

In the case under consideration, \$5,000 were paid for a ground-rent of \$500 per annum. This circumstance, although ten per cent. be received on the money paid, does not make the contract unlawful. If it were a *bona fide* purchase of an annuity, there is an end to the question; and the condition which gives the option to the vendor to repurchase the rent, by paying the \$5,000 after the lapse of five years, would not invalidate the contract. 1 Brown's Ch., 7, 93. The right to repurchase, as also the inadequacy of price, would be circumstances for the consideration of a jury.

The case reported in 2 Coke, 252, is strongly relied on by the counsel for the defendant. In that case an action of debt was brought upon an obligation of £300, conditioned for the payment of £20 per annum, during the lives of the plaintiff's wife and son. The defendant pleaded the statute of usury, and that he applied to the defendant to borrow of him £120, at the lawful rate of interest; but that he corruptly offered to deliver £120 to him, if he would be obliged to pay £20 per annum.

The court considered this an absolute contract for the payment of £20 per annum during two lives; and no agreement being made for the return of the principal, it was not considered usury. But, they stated, if there had been

any provision for the repayment of the principal, although not expressed in the bond, the contract would have been usurious. This is a leading case, and the principle on which it rests has not been controverted by modern decisions.

Scholfield, it appears, was under no obligation to repurchase the annuity, but he had the option of doing so after the lapse of five years, which is a strong circumstance to show the nature of the transaction. The purchase of an annuity, or any other device used to cover a usurious transaction, will be unavailing. If the contract be infected with usury, it cannot be enforced. Where an annuity is raised with the design of covering a loan, the lender will not be exempted by it from the penalties of usury. 3 Bos. & Pul., 159. On this point there is no contradiction in the authorities.

If a party agree to pay a specific sum exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty. Where a loan is made to be returned at a fixed day with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.

Does the decision in this case, as has been contended, depend upon a construction of the contract? Are there no averments in the pleas which place before the court material facts to constitute usury that do not appear on the face of the deed? If the court were limited to a mere construction of the contract, they would have no difficulty in deciding that the case was not strictly embraced by the statute.

In the second plea, the plaintiff below prays oyer of the deed of indenture, and among other statements alleges "that it was corruptly agreed between the said Scholfield and the said Moore, that the said Moore should lend to him the sum of \$5,000, and in consideration thereof, that he should execute the said deed," etc. And in another part of the same plea it is stated "that the said Moore did corruptly agree that he would in the said indenture covenant, etc., that if the said Scholfield, his heirs and assigns, should, at any time after the expiration of five years from the date of said indenture, pay to said Moore, his heirs and assigns, the sum of \$5,000, together with all arrears of rent, he, the said Moore, would release to him the said annuity." And it is further alleged "that the said Moore, in pursuance and in prosecution of the said corrupt agreement, did advance to the said Scholfield the said sum of \$5,000." And again, "that the said deed of indenture was made in consideration of money lent upon and for usury; and that, by the said indenture, there has been reserved and taken above the rate of \$6 per annum in the hundred, for the forbearance of the said sum of \$5,000 so lent as aforesaid."

The fourth plea contains, substantially, the allegations as to the lending, etc., that are found in the second plea. The facts stated in the pleas are admitted by the demurrers, and the question of usury arises on these facts, connected as they are with the contract. Although the second and fourth pleas may not contain every proper averment with technical accuracy, yet they are substantially good. All the material facts to constitute usury are found in the second plea.

It states a corrupt agreement to loan the money at a higher rate of interest than the law allows. That the money was advanced and the contract executed in pursuance of such agreement. That on the return of the principal, with a full payment of the rent, after the lapse of five years, the annuity was to be re-



leased. The amount agreed to be paid above the legal interest for the forbearance is not expressly averred, but the facts are so stated in the plea as to show the amount with certainty. Five hundred dollars, under cover of the annuity, were to be paid annually for the forbearance of the \$5,000, making an annual interest of ten per cent. Do not these facts, uncontradicted as they are, amount to usury? Is it not evident, from this statement of the case, that the annuity was created as a means for paying the interest until the principal should be returned, and as a disguise to the transaction? Such is the legitimate inference which arises from the facts stated in the plea.

At this point in the case an important question is raised, whether Lloyd, the plaintiff in the replevin, being the assignee of Scholfield, can set up this plea of usury in his defense. It is strongly contended that he cannot. He purchased this property, it is alleged, subject to the annuity, and paid for it a proportionably less consideration. That knowing of the charge before he made the purchase, it would be unjust for him now to evade the payment. And the inquiry is made, whether Lloyd could plead usury in this contract, if the annuity had been purchased by Scholfield. He would be estopped from doing so, it is urged, by the obligations of his own contract, as he is now estopped from resisting the claim of Moore.

As to the injustice of the defense, it may be remarked that the objection would apply with still greater force against Scholfield, if he were to attempt, by a similar defense, to evade the payment of the annuity. He received the money after assenting to the contract; but he is at liberty to evade the payment of the annuity by the plea of usury. Is the position correctly taken, that no person can avail himself of this plea but a party to the original contract?

§ 439. *Usurious securities are not only void as between the original parties, but even in the hands of third persons who are strangers to the transaction.*

The principle seems to be settled that usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. Comyn on Usury, 169. A stranger must "take heed to his assurance, at his peril," and cannot insist on his ignorance of the contract in support of his claim to recover upon a security which originated in usury.

In the case of *Lowe v. Waller*, Doug., 735, the plaintiff was the indorser of a bill originally made upon a usurious contract; though he had received it for a valuable consideration, and was entirely ignorant of its vice, the court of king's bench, after great consideration, determined that the words of the statute were too strong; and that, after what had been held in a case on the statute against gaming, the plaintiff could not recover.

If a bill of exchange be drawn in consequence of a usurious agreement for discounting it, although the drawer to whose order it was payable was not privy to this agreement, still, it is void in the hands of a *bona fide* indorser. 2 Camp., 599. In Holt's N. P., 256, Lord Ellenborough lays down the law that a *bona fide* holder cannot recover upon a bill founded in usury; so neither can he recover upon a note where the payee's indorsement, through which he must claim, has been made by a usurious agreement. But, if the first indorsement be valid, a subsequent usurious indorsement will not affect him; because such intermediate indorsement is not necessary to his title to sue the original parties to the note.

If a note be usurious in its inception, and it pass into the hands of a *bona*

*fide* holder who has no notice of the usury, and the drawer give to the holder a bond for the amount of the note, the bond would not be affected by the usury. 8 Term Rep., 390. In the case of *Jackson v. Henry*, 10 Johns., 185, a plea of usury was set up to invalidate the title of a purchaser at a sale of mortgaged premises. This sale, under the statute of New York, is equivalent to a foreclosure by a decree in chancery; and the court decided that the title of the purchaser was not affected by usury in the debt for which the mortgage was given. The statute of New York declares all bonds, bills, contracts and assurances infected with usury "utterly void." And so say the court on the adjudged cases, when the suit at law is between the original parties, or upon the very instrument infected.

The case of *D'Wolf v. Johnson*, 10 Wheat., 367 (§§ 460-67, *infra*), is relied on by the counsel for the defendant, as a decision in point. In that case it will be observed that the first mortgage, being executed in Rhode Island in 1815, was not usurious by the laws of that state; and the second one, executed in Kentucky, in 1817, being a new contract, was not tainted with usury. The question, therefore, whether the purchaser of an equity of redemption can show usury in the mortgage to defeat a foreclosure, was not involved in that case.

§ 440. *A usurious loan in the shape of an annuity charged upon real estate is void even as against a purchaser of the realty charged therewith, and he may defend accordingly.*

The Virginia statute makes void every usurious contract; and the second plea contains allegations which, uncontradicted, show that the contract between Moore and Scholfield was usurious in its origin. This contract, thus declared to be void, is sought to be enforced against Lloyd, the purchaser of the property charged with the annuity. Between Scholfield and Lloyd there is a privity; and if the contract for the annuity be infected with usury, is it not void as against Lloyd?

In this contract a summary remedy is given to enter on the premises, and levy by distress and sale of the goods and chattels there found, for the rent in arrear; and if the distress should be insufficient to satisfy the rent, and it should remain unpaid for thirty days, Moore is authorized to enter upon the premises, and to expel Scholfield, his heirs and assigns, and hold the estate. Lloyd, as the assignee of Scholfield, comes within the terms of the contract, and is liable, being in possession of the premises, to have his property distrained for the rent, and, if it be not paid, himself expelled from the possession. Under such circumstances, may he not avail himself of the plea of usury, and show that the contract which so materially affects his rights is invalid? Moore seeks his remedy under this contract, and if it be usurious and consequently void, can it be enforced?

If usury may be shown in the inception of a bill to defeat a recovery by an indorsee, who paid for it a valuable consideration without notice of the usury, may not the same defense be set up where, in a case like the present, the party to the usurious contract claims, by virtue of its provisions, a summary mode of redress? The court entertain no doubt on this subject. They think a case of usury is made out by the facts stated in the second plea, and that Lloyd may avail himself of such a defense. The judgment of the circuit court must be reversed, and the cause remanded, with instructions to overrule the demurrers to the second and fourth pleas, and permit the defendant to plead.

SCOTT v. LLOYD.

(9 Peters, 418-460. 1835.)

ERROR to the Circuit Court for the County of Washington, District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is an action of replevin instituted in the circuit court for the county of Alexandria, and removed, for trial, to the county of Washington. The plaintiff in error, the original defendant, avowed, as bailiff of William S. Moore, that the goods replevied were distrained for rent in arrear. The plaintiff in replevin, after cravingoyer of the deed, by which the rent alleged to be in arrear was reserved, pleaded the statute of usury in bar of the claim. The plea alleged that the contract between the parties was a corrupt and usurious lending of the sum of \$5,000, upon an interest of ten per centum per annum. Other issues were joined in the cause, but they are not noticed, because they are of no importance.

On the trial, the plaintiff in replevin offered Jonathan Scholfield as a witness, who was objected to by the avowant, but admitted by the court, and to this admission the avowant excepted. In support of his objection to the competency of the witness the counsel for the avowant exhibited a deed, executed on the 11th of June, 1814, by Scholfield and wife to William S. Moore, by whose authority the distress was made, by which the said Scholfield and wife, in consideration of \$5,000 paid by the said Moore to the said Scholfield, granted to the said William S. Moore, his heirs and assigns forever, one certain annuity or rent of \$500, to be issuing out of and charged upon a lot of ground and four brick tenements and appurtenances thereon erected, lying in the town of Alexandria, and particularly described in the deed.

Also, a deed between the said Scholfield and wife, of the first part, John Lloyd, the plaintiff in replevin, of the second part, and Andrew Scholfield, of the third part; conveying to the said John Lloyd the lot of which the annuity or rent charge of \$500 had been granted to William S. Moore. This deed contains several covenants, and, among others, a stipulation that the lot shall remain subject to the annuity to William S. Moore. Also, the following letter from Scholfield to Lloyd:

“ALEXANDRIA, June 9, 1824.

“SIR: As you hold under me the property on which I granted a rent charge of \$500 a year to William S. Moore, I now give you notice the contract by which that rent charge was created I consider to be usurious, and that I shall take measures to set aside the same; and I hereby require you to withhold from William S. Moore the payment of any further money on account of this rent charge; and in case distress should be made upon you for the rent, I promise to save you harmless if you will resist the payment by writ of replevy. I wish you to understand that if you make any further payments after receiving this notice, that you make them at your own risk.

“I am, with great respect, yours,

“JONATHAN SCHOLFIELD.

“To Mr. John Lloyd.”

This letter was delivered to Mr. Lloyd on the day of its date. Also, a deed of the 18th of November, 1826, from said Scholfield, making a conditional assignment of one-fifth of said annuity of \$500 to Thomas K. Beale, in which he recites and acknowledges his reponsibility to Lloyd on account of the distress for rent made by William S. Moore.

Also, an exemplification of the record of the proceedings in the county court of Fairfax, in the commonwealth of Virginia, upon the insolvency and discharge of the said Scholfield, as an insolvent debtor, in May, 1822. Whereupon the plaintiff in replevin, to support the competency of the said Scholfield, laid before the court the following documents:

A release from said Scholfield to the plaintiff in replevin, dated the 13th day of June, 1831, whereby said Scholfield, in consideration of \$5,000 released to him by the said Lloyd, out of a debt due by him to Lloyd, grants to said Lloyd all the right, title and interest which he has or may have, from the decision of the suit depending for the annuity or rent charge granted to Moore, or which he has or may have thereafter to the brick buildings upon which the said annuity or rent charge is secured. He also releases the said Lloyd from all covenants or obligations, expressed or implied, arising out of the deed of assignment from him to said Lloyd; and also from all claims, etc., which now exist or may hereafter arise out of the said deed, etc. Also, a release from the same to the same, dated 25th of April, 1828, in which Scholfield releases to Lloyd all his right, etc., to the said suit, etc., and to all sums of money which may accrue, and from all actions, etc., on account of the said suit, etc.

Also, a release of the same date from Thomas K. Beale and James M. McCrea releasing the said Jonathan Scholfield from \$950, part of a debt of \$2,000, due from him to them. Also, a release from Joseph Smith, of same date, releasing \$1,150, part of a debt of \$3,000, due to him from said Scholfield. Also, a release of William Veitch and Benoni Wheat, discharging the said Scholfield from \$250, part of a debt of \$800, due to them from him. Also, an engagement of John Lloyd, dated the 25th of April, 1828, binding himself to the several persons who executed the foregoing releases for the several sums released by them, in the event of his succeeding in the suit then depending between himself and Charles Scott, bailiff of William S. Moore. Also a release from John Lloyd, stating that whereas Jonathan Scholfield stood indebted to him in a large sum of money, he had agreed to release, and did thereby release, the said Scholfield from \$5,000, part of the said debt.

§ 441. *A letter notifying an occupant not to pay rent to another, and promising to save him harmless, is an undertaking that disqualifies the writer as a witness about the rent.*

In discussing the competency of the witness, some diversity of opinion prevailed on the question whether he could be received to invalidate a paper executed by himself; but, without deciding this question, a majority of the court is of opinion that he is interested in the event of the suit. His letter of the 9th of June, to John Lloyd, the tenant in possession, requiring him to withhold from William S. Moore the payment of any further sum of money, on account of this rent charge, contains this declaration: "And in case distress should be made upon you for the rent, I promise to save you harmless if you will resist the payment by writ of replevy. I wish you to understand that if you make any further payments after receiving this notice, that you make them at your own risk."

This is an explicit and absolute undertaking to assume all the liabilities which Mr. Lloyd might incur by suing out a writ of replevin, if an attempt should be made to levy the rent by distress. Mr. Scholfield then is responsible to Mr. Lloyd for the costs of this suit. This is a plain and substantial interest in the event of the suit, from which Mr. Lloyd alone can release him. This liability was incurred before the sale and release from Scholfield to Lloyd,

of the 13th of June, 1831, and Mr. Scholfield's responsibility depended on the decision of the suit in which he was called as a witness, unless his release to and contract with Lloyd of the 13th of June, 1831, could discharge him from it. That contract transferred to Lloyd all the interest of Scholfield in the ground charged with the rent to Moore, but did not transfer with it his obligation to save Lloyd harmless for resisting the claim of Moore to the rent in arrear. It produced a state of things which removed all motives, on the part of Scholfield, for incurring fresh liabilities, but did not discharge him from liabilities already incurred. It placed in his hands the entire management of the suit, but did not enable him to undo what was done, or to relieve himself from the claim of Moore to costs, should the suit terminate in his favor. The responsibility of Lloyd to Moore continued, and the correlative responsibility of Scholfield to Lloyd still continued also unless Lloyd had released him from it. Now, there is no expression in the contracts between the parties which purports to be such a release. It has been inferred as the result of the change in the situation of the parties, but we do not think the inference justified by the fact. The obligation is unequivocal; is expressed in plain and positive terms; is dependent on the event of a suit, and independent of the ownership of the property. The parties enter into a contract by which the property is transferred, without making any allusion to this obligation. It remains, we think, in full force, and, consequently, Jonathan Scholfield was an interested and incompetent witness.

In the progress of the examination, the plaintiff's counsel put to the witness the following question: "Did you, in the course of your discussions as to the time you were to keep the money, state your object in the application to be, to have the use of the \$5,000 for a limited time?" To which the defendant's counsel objected, as being a leading interrogatory. The plaintiff's counsel then varied the question as follows: "Did you or did you not, in the course of your discussions," etc. To which the defendant's counsel made the same objection; but the court overruled the objection and permitted the question to be put, and the defendant excepts to that decision.

§ 442. *Although an exception be made, if it be not prayed, or signed by the judge, it is not actually taken and will not be considered.*

Although the plaintiff's counsel objected to this question, and said that he excepted to the opinion of the court, no exception is actually prayed by the party, or signed by the judge. This court, therefore, cannot consider the exception as actually taken, and must suppose it was abandoned. Evidence was given by the plaintiff in replevin, conducing to prove that the contract between Scholfield and Moore, under which the sum of \$5,000 was advanced by the latter to the former, originated in an application for a loan of money, not for the purchase and sale of a rent charge or annuity. Scholfield applied to Moore to raise or borrow \$5,000, securing him on an annuity or ground-rent for one year. Moore proposed to let him have the money for ten years on the same security. After much discussion the parties agreed to split the difference and that Scholfield should keep the money five years. Scholfield says his first proposition was to allow ten per cent., and to secure it by an annuity or ground-rent on the houses mentioned in the deed. No other interest but ten per cent. was mentioned; Scholfield had no intention of selling the property. It was also in evidence that Moore was a money lender, and was in the habit of advancing money, secured on ground-rents or annuities; and that Schol-

field was a money borrower; and that the property was an ample security for the money lent and for the annuity.

On the part of the avowant, it was proved that the usual value of those ground-rents or annuities charged on lots in Alexandria was such as to afford an interest of ten per cent. per annum on the principal sum advanced; and it was admitted by Scholfield that he gave Moore no promise, stipulation or security for the return of the \$5,000, other than is contained in the deed itself. Many witnesses were examined, and a great deal of testimony, bearing more or less directly on the contract, was adduced.

The deed from Scholfield and wife to W. S. Moore, by which, in consideration of \$5,000, the annuity or rent charge of \$500 per annum was created, contains a covenant "that the said J. Scholfield, his heirs and assigns, will well and truly pay to the said W. S. Moore, his heirs and assigns, the said annuity or rent charge of \$500, by equal half-yearly payments, on the 10th day of June and on the 10th day of December in each year, forever hereafter, as the same shall become due; and that if the same be not punctually paid, then it shall be lawful for the said W. S. Moore, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy, by distress and sale of the goods and chattels there found, the rent in arrear and the costs of distress and sale; and if the same shall remain in arrear and unpaid for the space of thirty days after any day of payment, as aforesaid, and no distress sufficient to satisfy the same can be found on the premises charged, then it shall be lawful for the said W. S. Moore, his heirs and assigns, to enter on the premises charged, and from thence to remove and expel the said J. Scholfield, his heirs and assigns, and to hold and enjoy the same as his and their absolute estate forever thereafter." "And that the said J. Scholfield, his heirs and assigns, will forever hereafter keep the buildings and improvements which now are or hereafter may be erected on the premises charged, fully insured against fire, in some incorporated insurance office, and will assign the policies of insurance to such trustees as the said W. S. Moore, his heirs or assigns, may appoint; to the intent that if any damage or destruction from fire shall happen, the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged."

"And lastly, that he and his heirs will forever warrant and defend the annuity or rent charge, hereby granted to the said W. S. Moore, his heirs and assigns, against any defalcation or deduction, for or on account of any act of him, his heirs or assigns."

The deed contained a further covenant, that if, at any time after five years, the said J. Scholfield should pay to the said W. S. Moore the sum of \$5,000, with all arrears of rent, etc., the said W. S. Moore will execute any deed releasing or extinguishing the said rent or annuity.

When the testimony was closed, the counsel for the defendant and avowant prayed the court to instruct the jury "that the contract between said Jonathan Scholfield and William S. Moore, such as it is evidenced by the deed from said Scholfield and wife to said Moore, set out in the proceedings, and given in evidence by the plaintiff as aforesaid, was lawful, and free of the taint of usury; and in order to impeach it of usury and support the issues of fact joined in this cause on the part of the plaintiff, it is necessary for the plaintiff to prove that, besides the contract imported by the terms of said deed, there was an actual contract between said Scholfield and Moore for the

loan of \$5,000 at usurious interest, to wit, at the rate of ten per cent. per annum, to be disguised under the form and name of an annuity or rent charge; and that such sum was actually lent by said Moore to said Scholfield, and said deed given in pursuance and execution of such contract and loan, securing the said usurious interest under the form and name of such annuity or rent charge; that the facts given in evidence to the jury as aforesaid to support the issues above joined on the part of the plaintiff did not import such a lending of money by Moore to Scholfield at usurious interest as was sufficient to support the issues joined on the part of the plaintiff in replevin, upon the second and fourth pleas by the plaintiff in replevin, pleaded to the cognizance in this case." Which instruction the court refused to give; to which refusal the defendant and avowant, by his counsel, prayed an exception, which was signed.

§ 443. *Instructions on the question of usury; province of the jury.*

The substantial merits of the case are involved in the subsequent instructions which the court actually gave; and it will be apparent, when we proceed to the consideration of those instructions, that if they ought to have been given, this ought to have been refused. There are, however, objections to the manner in which these instructions are framed, which ought not to have been overlooked by the court. The statute against usury not only forbids the direct taking of more than six per centum per annum for the loan or forbearance of any sum of money, but it forbids any shift or device by which this prohibition may be evaded and a greater interest be in fact secured. If a larger sum than six per cent. be not expressly reserved, the instrument will not of itself expose the usury; but the real corruptness of the contract must be shown by extrinsic circumstances which prove its character. Those circumstances must of course be viewed in connection with the contract. The counsel for the avowant asks the court to separate the instrument from its circumstances, and to inform the jury that the instrument itself was lawful and free from the taint of usury; and that to fix this taint upon it the plaintiff in replevin must prove, besides the contract in the deed, an actual contract stipulating interest at the rate of ten per centum per annum for the loan of \$5,000. Had this instruction been given, circumstances which demonstrated the intention of the parties and explained completely the contract actually made, if such existed, must have been disregarded by the jury. The court is next requested to say to the jury that the facts given in evidence did not import such a lending as would support the issue.

The court is thus asked to usurp the province of the jury and to decide on the sufficiency of the testimony, in violation of the well established principle that the law is referred to the court, the fact to the jury. The court did not err in refusing to give this instruction.

"The plaintiff then prayed the court further to instruct the jury that the matters shown in evidence to the jury as aforesaid are proper for the consideration of the jury to determine, from the whole evidence, under the instruction of the court as already given to them in this cause, whether the said contract so made between the said Moore and Scholfield was, in substance and effect, a loan at usurious interest, or a *bona fide* contract for the bargain and sale of a rent charge; and if the jury, from the said whole evidence under the instructions as aforesaid, shall believe it to have been such a loan, they should find for the plaintiff; if otherwise, for the defendant." The court gave this instruction and the defendants excepted to it. Its correctness is now to be examined.

§ 444. *Under a statute of usury "for loan of money," there must be a loan; and where it is in fact a usurious loan, no form of contract can be made to free it from usury.*

The statute declares "that no person shall, upon any contract, take directly or indirectly, for loan of any money," etc., "above the value of \$6 for the forbearance of \$100 for a year," etc. It has been settled that to constitute the offense there must be a loan, upon which more than six per cent. interest is to be received; and it is also settled, that where the contract is in truth for the borrowing and lending of money, no form which can be given to it will free it from the taint of usury, if more than legal interest be secured.

The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded. Among the earliest and most common of these is the purchase of annuities, secured upon real estate or otherwise. The statute does not reach these, not only because the principal may be put in hazard, but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit. The purchase of an annuity, therefore, or rent charge, if *bona fide* sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet it is apparent that, if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it.

Though this principle may be extracted from all the cases, yet as each depends on its own circumstances, and those circumstances are almost infinitely varied, it ought not to surprise us if there should be some seeming conflict in the application of the rule by different judges. Different minds allow a different degree of weight to the same circumstances.

§ 445. *Authorities reviewed.*

The *King v. Drury*, 2 Lev., 7, is a very strong case in favor of the avowant, and has been much pressed on the court by his counsel. Brown agreed to assign to Drue a lease of a house for forty years for the sum of £300. Drue not having the money, Drury, by agreement with Drue, paid the £300, took the assignment to himself, and then let the house to Drue for thirty-nine and three quarter years, at a rent, of which £30 was payable to himself. Drury covenanted that if, at the end of four years, Drue paid the £300, he would convey the residue of the term to Drue. Per Hale, C. J.: "This is not usury within the statute; for Drue was not bound to pay the £300 to Drury." "It is no more in effect than a bargain for an annuity of £30 yearly, for thirty-nine and three quarter years, for £300 to be secured in this manner, determinable sooner if the grantor pleases; but the grantee hath no remedy for his £300." "And so the acceptance of the £7 10s. is not usury. But if Drury had taken security for the repayment of the £300, or it had been by any collateral agreement to be repaid, and all this method of bargaining a contrivance to avoid the statute, this had been usury."

This case has been cited to prove that, without an express stipulation for the repayment of the money advanced, a contract cannot be usurious, whatever profit may be derived from it. It must be admitted that although Lord Hale does not say so in terms, the case, as reported, countenances this construction. But the accuracy of the report must be questioned; and it is be-



lied that such a principle would not now be acknowledged in the courts of England.

Chief Justice Hale considers the transaction simply as a bargain for an annuity, not as a loan of money. Whether the circumstances of the case warranted this conclusion or not, it is the conclusion he drew from them. The negotiation between Drue and Drury, by which the latter advanced the money, became the assignee of the term, and then leased it to the former, accompanied with a power of redemption, are totally overlooked by the judges. It had no influence on the case. It was not considered as affording any evidence that the transaction was in reality a loan of money. The principle of law announced by the judge is simply that a bargain for an annuity is not usury. He adds, that if the repayment of the £300 had been secured, and all this method of bargaining a contrivance to avoid the statute, this had been usury.

He connects the bargaining being a contrivance to avoid the statute, with a security for the repayment of the sum advanced, as if he thought this security indispensable to the effect of the bargaining, without which the contract could not be usurious.

It is obvious that if this inference of law from the fact be admitted without qualification, it will entirely defeat the statute. If an express stipulation for the repayment of the sum advanced be indispensable to the existence of usury, he must be a bungler, indeed, who frames his contract on such terms as to expose himself to the penalties of the law. If a man purchases for \$500 an annuity for \$200 per annum, redeemable at the will of the grantor in ten years, without any express stipulation for the repayment of the \$500, this, according to Drury's Case as reported, would be no more than a bargain for an annuity; and yet the grantor would receive excessive usury, and the grantee would be compelled, by the very terms of the contract, to repay the \$500 as certainly as if he had entered into a specific covenant for repayment, on which an action could be maintained. Lord Hale cannot have intended this. He has not said so in terms, and we must believe that he did not mean to require more than that the contract should not be such as, in effect, to secure the principal sum advanced with usurious interest. It would be a very unusual stipulation in the grant of an annuity that the money should be returned otherwise than by the annuity itself.

So in Finch's Case, reported in Comyn on Usury, 43, Canfield secured to Finch more than the legal interest on the money advanced by a rent issuing out of land, and the court determined that it was not usury, though Canfield had applied for a loan of money which Finch refused, offering at the same time to let him have the sum by way of annuity or rent. This was held not to be usurious. "This," said the court, "is not a contract commenced upon a corrupt cause, but an agreement for a rent which it is lawful for every one to make." But it is said that if £12 in the £100 had been offered to be paid (the legal interest was then ten per cent.), and the other had said that he would accept it, but that this would be in danger of the law, and therefore he did not like to contract upon these terms, but that if the other party would assure him annual rent for his money then he would lend it, and upon this an agreement for the rent had been made, this would have been within the statute." The same principle is decided in Cro. James, 252. These cases turn on the evidence which shall be sufficient to prove a loan to be the foundation of the contract, but do not withdraw the case from the statute if a loan be its foundation. They decide that a mere application for a loan does not convert a sub-

sequent annuity, which yields a profit beyond legal interest, into a usurious contract, but that an actual contract for the loan, if converted into an annuity in order to avoid the law, is within the statute.

In these cases the court decides upon the fact, and determines that a variation in it, the importance of which is not distinctly perceived, would bring the contract within the law. In all of them we think it probable that a court of the present day would leave it to the jury to say whether the contract was a fair purchase or a loan, and would direct the jury to find for the plaintiff or defendant, as their opinion on that fact might be.

In Fuller's Case, 4 Leon., 208, and in *Symonds v. Cockerill*, Noy, 151, and Brownlow, 180, a distinction is taken between the purchase of an annuity without any communication respecting a loan, and a purchase where the negotiation commences with an application to borrow money, though no contract of a loan followed such application. In a case between Murray and Harding, reported in Comyns on Usury, 51, Markham, an attorney, at the request of Robert Harding, rector of Grafton Regis, applied to Mrs. Mary Murray to lay out £120 in the purchase of an annuity of £20 a year for the defendant's life, charged on his rectory of Grafton, redeemable to him at the end of the first five years, upon the payment of £109 10s. There was no communication with her about a loan, but merely about the purchase of such redeemable annuity, although Harding had mentioned to his attorney, Markham, a wish to borrow £100 or upwards.

This case was brought before the court. In giving his opinion on it, Chief Justice De Grey said, "communication concerning a loan has sometimes infected the case and turned the contract into usury, but then the communication must be mutual." "I know no case where even a meditated loan has been *bona fide* converted into a purchase and afterwards held to be usurious. To be sure it is a strong and suspicious circumstance; but if the purchase comes out to be clearly a *bona fide* purchase, it will, notwithstanding, be good." "If a power of redemption be given, though only to one side, it is a strong circumstance to show it a loan, as in *Lawley v. Hooper*. But that alone will not be conclusive." The chief justice added, in the present case the principal is precarious, and secured only by the life of a clergyman and his continuing to be beneficed."

In *Lawley v. Hooper*, 3 Atk., 278, Thomas Lawley, being entitled to an annuity of £200 a year for life, sold £150, part thereof, to Rowland Davenant for £1,050, with power to repurchase on giving six months' notice. After the death of Davenant, Lawley brought this bill against his executors for an account, and that, upon payment of what should be due, the defendants might re-assign the annuity to the plaintiff. In giving the opinion the chancellor said, "there has been a long struggle between the equity of this court and persons who have made it their endeavor to find out schemes to get exorbitant interest and to evade the statutes of usury. The court very wisely hath never laid down any general rule beyond which it will not go. In this case there are two questions to be considered: 1. Whether this assignment is to be considered as an absolute sale or a security for a loan. As to the first, I think, though there is no occasion to determine it, there is a strong foundation for considering it a loan of money; and I really believe in my conscience that ninety-nine in a hundred of these bargains are nothing but loans, turned into this shape to avoid the statutes of usury."

The chancellor then proceeds to state the circumstances under which the

contract was made and the character of the contract itself; and although there was no treaty about a loan, he considers it as one. After enumerating the circumstances, he concludes with saying, "therefore, upon all the circumstances, I think it was, and is to be taken as, a loan of money, turned into this shape only to avoid the statute of usury; but I do not think I am under any absolute necessity to determine this point, for I am of opinion that this is such an agreement as this court ought not to suffer to stand, taking it as an absolute sale." The relief asked by the plaintiff in his bill was granted.

In the noted case of *Chesterfield, Executor of Spencer, v. Janssen*, reported in 1 Atk., 339, and 1 Wils., 286, £5,000 was advanced by Janssen on the bond of Mr. Spencer, to pay £10,000 should he survive the Duchess of Marlborough. After the death of Mr. Spencer this bond was contested by his executor, and one of the points made was that it was usurious. The cause was argued with great ability, and determined not to be within the statutes because the principal was in hazard. In giving this opinion the judges define usury in terms applicable to the present case. "To make this contract usurious," says Mr. Justice Burnet, "it must be either because it is within the express words, or an evasion or shift to keep out of the statutes. Whatever shift is used for the forbearance or giving day of payment will make an agreement usurious, and is by a court and jury esteemed a color only. Suppose a man purchase an annuity at ever such an under price, if the bargain was really for an annuity it is not usury. If on the foot of borrowing and lending money, it is otherwise; for if the court are of opinion the annuity is not the real contract, but a method of paying more money for the reward or interest than the law allows, it is a contrivance that shall not avoid the statute."

The lord chancellor said: "If there has been a loan of money, and an insertion of a contingency which gives a higher rate of interest than the statutes allow, and the contingency goes to the interest only, though real and not colorable, and notwithstanding it be a hazard, yet it has been held usurious. Where the contingency has related to both principal and interest, and a higher interest taken than allowed by the statute, the courts have then inquired whether it was colorable or not."

Wilson reports the chancellor to have said: "Courts regard the substance and not the mere words of contracts. Loans, on a fair contingency to risk the whole money, are not within the statute; a man may purchase an annuity as low as possible, but if the treaty be about borrowing and lending, and the annuity only colorable, the contract may be usurious however disguised."

*Richards qui tam v. Brown*, Cowper, 770, was an action on the statute of usury. Richard Heighway applied to Brown for a loan of money, to which Brown assented and advanced part of the money, promising to advance the residue, being £400, in a fortnight. After some delays, Brown said he could not raise the money himself, but would try and get it of a friend in the city who was a hard man. Heighway said he would give twenty or thirty guineas rather than not have the money. Brown said "that his friend never lent money but on an annuity at six years' purchase. However," he added, "if you will take the money on those terms, I will engage to furnish you with money to redeem in three months' time." Heighway executed a bond and warrant of attorney, for conveying the annuity to one Waters. The money was really advanced by Brown, and the name of Waters was used by him. Heighway deposed that Brown first proposed the annuity. He himself would

not have granted one. Heighway pressed for the money to redeem, but Brown refused it.

Lord Mansfield told the jury that if they were satisfied "that in the true contemplation of the parties this transaction was a purchase by the one, and a sale by the other, of a real annuity, how much soever they might disapprove of or condemn the defendant's conduct, they must find a verdict for him. But on the contrary, if it appeared to them to have been in reality and truth the intention of both parties, the one to borrow and the other to lend, and that the form of an annuity was only a mode forced on the necessity of the borrower by the lender, under color of which he might take a usurious and exorbitant advantage, then they might find for the plaintiff, notwithstanding the contingency of the annuitant dying within three months."

The jury found for the plaintiff. On a motion for a new trial, Lord Mansfield said: "The question is, what was the substance of the transaction, and the true intent and meaning of the parties? for they alone are to govern, and not the words used. The substance here was plainly a borrowing and lending. Heighway had no idea of selling an annuity, but his declared object was to borrow money." "It is true there was a contingency during three months. It was that which occasioned the doubt whether a contingency for three months is sufficient to take it out of the statute." The new trial was granted.

In the case of *Irnham v. Child*, 1 Br. Ch. Rep., 93, Lord Thurlow is reported to have said (referring to previous *dicta*): "All, therefore, that seems to be meant is this: that the annuity shall be absolutely sold without any stipulation for the return of the principal; and that it shall not be intended as a means of paying interest until such principal is returned. But where there is a sale, it is not usurious to make it redeemable."

In *Drew v. Power*, 1 Sch. & Lef., 182, the plaintiff being much embarrassed in his circumstances communicated to the defendant his desire to raise money to extricate himself from his debts. After approving his purpose and increasing sufficiently his anxiety for its accomplishment, the defendant informed him that two of his estates, Poulagower and Knockavin, would shortly be out of lease, and that, if he would make the defendant a lease of them for three lives, at the rent of £200 per annum, he would, from friendship, advance him money sufficient to pay all his debts. The plaintiff assented to this proposition. The bill then proceeds to charge much unfairness and oppression on the part of the defendant in making advances towards paying the debts of the plaintiff, and states that he claimed a balance of £1,015 15s., for which he demanded the plaintiff's bond. This was given. The defendant then required a lease for Poulagower and Knockavin, which was executed for three young lives, at the rent of £200 per annum, which was greatly below their value. The defendant also obtained other leases from the plaintiff. The bill details a great variety of other transactions between the parties, which are omitted as being inapplicable to the case now before this court. The bill was brought for a full settlement of accounts, and that, on payment of the balance fairly due to the defendant, the leases he had obtained from the plaintiff might be set aside.

The defendant, in his answer, denied the charges of oppressive and iniquitous conduct set up in the bill, and insisted that the lands called Poulagower and Knockavin, having been advertised to be let, he agreed to take them at a valuation, and insisted that he paid a fair rent for them. The cause came on

to be heard before the master of the rolls, who directed several issues to try whether the full and fair value of the lands were reserved on the leases granted by the plaintiff to the defendant; and whether either, and which of them, were executed in consideration of any and what loan of money, and from whom.

The case was carried before the lord chancellor, who disapproved the issues and gave his opinion at large on the case. After commenting on the testimony respecting the leases, he says: "Hastings has distinctly proved that the loan of money was the inducement to this lease, and if it was, it vitiates the whole transaction. I do not mean advancing money by way of fine or the like; but where it is a distinct loan of money to a distressed man, for which security is to be taken, and he is still to continue a debtor for it. If I were to permit this to be considered as a transaction which ought to stand, I should permit a complete evasion of the statute of usury." The chancellor concluded a strong view of the testimony, showing a loan of money to be the consideration on which the leases were granted, with saying, "there is no reason to send this case to a jury." "There is sufficient to satisfy the conscience of the court that these leases ought not to stand."

The case of *Marsh v. Martindale*, 3 Bos. & Pul., 154, was a judgment on a bond for £5,000. The consideration on which the bond was given was a bill drawn by Robert Wood on Martindale, Filet & Co., for £5,000, payable three years after date. The bill was accepted, the interest discounted by Sir Charles Marsh, and the residue of the money paid to Martindale for the purpose of enabling him to discharge certain annuities for which he was liable.

On a motion for a new trial, Lord Alvanley, chief justice, said: "It was contended that the transaction was to all intents a purchase of an annuity; and this certainly was the strongest ground which the plaintiff could take, for it has been determined in all the cases on the subject, that a purchase of an annuity, however exorbitant the terms may be, can never amount to usury. But if the transaction respecting the annuity be under cover for the advancement of money by way of loan, it will not exempt the lender from the penalty of the statute, or prevent the securities from being void. Then is this transaction the purchase of an annuity or is it not?" After restating the transaction the judge asked: "What is this but forbearing for three years to take the sum of £4,250, for which forbearance he was to receive interest on £5,000?"

The judge referred to the case in *Noy*, 151, as applicable to this. "There," he said, "a question having arisen whether a deed securing a rent charge were void for usury, the court agreed that if the original contract were to have a rent charge, that is not usury, but a good bargain; but if the party had come to borrow the money, and then such a bargain had ensued by security, then that is usury."

*Doe*, on the demise of *Grimes et al.*, assignees of *Hammond* (a bankrupt) *v. Gooch*, 3 Barn. & Ald., 664, was an ejectment. *Hammond* had taken ground on a building lease at the rent of £108 per annum. He assigned the premises to *Roberts* for £2,300, a sum considerably above their then value, and at the same time took a lease from *Roberts* at the increased rent of £395, containing the same covenants for building as were in the original lease, together with a stipulation that he should be at liberty, on giving six months' notice, to repurchase the premises at the same price for which he had sold them to *Roberts*. *Hammond* completed the houses, and, having become a bankrupt, his assignees brought this action against the tenant of *Roberts*. The judge left it to the

jury to say whether the transaction between Hammond and Roberts was, substantially, a purchase or a loan, and told them "that if they thought it was a loan, the deeds were void, the transaction being usurious." The jury found a verdict for the plaintiff. On a motion for a new trial, counsel contended that the deeds imported a purchase. That the principal money was altogether gone, unless Hammond chose to redeem, and, though it may be his interest so to do, this will not make it a usurious transaction. If a person have an annuity secured on a freehold estate, it may be clearly his interest to redeem it; but such a power will not make the bargain usurious. Here Bailey, justice, observed, "in that case the principal is in hazard from the uncertain duration of life. Here it is in the nature of an annuity for years, and there is no case in which an annuity for years has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with the legal interest, is to be received." The new trial was refused. In the case of *Low v. Waller*, Doug., 736, Lord Mansfield told the jury "that the statute of usury was made to protect men who act with their eyes open; to protect them against themselves. They were to consider whether the transaction was not in truth a loan of money, and the sale of goods a mere contrivance and evasion." The jury found the contract to be usurious. On a motion for a new trial, Lord Mansfield said: "The only question in all cases like the present is, what is the real substance of the transaction, not what is the color and form."

*Gibson v. Fristoe*, 1 Call, 62, was an action of debt brought by Gibson against *Fristoe et al.* in the district court of Dumfries. Issue was joined on the plea of the statute of usury. Verdict and judgment for the defendant, and appeal to the court of appeals. The case was shortly this: John Fristoe being indebted to John Gibson, by bond for £445 11s. 2d. sterling, on the 17th of December, 1787, assigned him bonds of perfectly solvent obligors for £780 currency at the agreed value of £382 8s. 2d. sterling, and gave a new bond with two sureties for a balance of £106 17s. 2d. sterling, payable in March following. Mr. Washington, for the appellant, said: "In all these cases the first inquiry is if there be a loan. I admit that if a real loan is endeavored to be covered under any disguise whatever, it is still usury." He contended that here was no loan, "but a purchase of property, for bonds are property."

In giving his opinion, Mr. Pendleton, the president of the court of appeals, said: "An agreement by which a man secures to himself, directly or indirectly, a higher premium than six per cent. for the loan of money, or the forbearance of a debt, is usury. If the principal or any considerable part be put in risk, it is not usury, because the excess in the premium is the consideration of that risk." "But if the bargain proceeds from and is connected with a treaty for the loan or forbearance of money it is usury, because the vendor is supposed to have submitted to a disadvantageous price under the influence of that necessity which the statute meant to protect him against." The judgment of the circuit court was affirmed.

*Clarkson's Administrator v. Garland* and another, reported in 1 Leigh, 147, was a bill in chancery brought by the plaintiff to be relieved against certain contracts, bonds and deeds of trust, alleged to be usurious. The bill states numerous usurious and oppressive transactions, which are generally and particularly denied in the answers. Testimony was taken, and the case, so far as it is applicable in principle to that under consideration, is thus stated:

Clarkson, wanting to raise \$2,235, applied to Jacobs, and offered him as many slaves as would command that sum. Jacobs advanced him, on the 23d

of March, 1815, \$2,335, and took an absolute bill of sale for sixteen slaves. It was at the same time agreed that the slaves should remain in Clarkson's possession on hire for one year, and if, at the end of the year, Clarkson shall pay Jacobs \$2,935, Jacobs shall, in consideration thereof, resell the slaves to him. The plaintiff charged that his application to Jacobs was to borrow money, and that the substance of the transaction was a loan, reserving a higher interest than is allowed by law.

On the 22d of May Clarkson again applied to Jacobs and obtained from him the further sum of \$2,666.26. For this sum he also gave Jacobs a bill of sale for fourteen slaves, redeemable by the payment of \$3,394, on or before the 23d of March, 1816. The plaintiff avers that this also was a loan, and that the pretended sale of slaves was a device to cover the taking of usurious interest. Jacobs, in his answer, avers that both contracts were in truth what they purport to be, *bona fide* agreements to purchase and resell the slaves therein mentioned.

The slaves not being redeemed, Garland, with full knowledge of the usury, as the bill charges, became jointly interested with Jacobs in both contracts. In August, 1816, they procured Clarkson's bond for \$7,000, being the aggregate of both debts, with further usury for forbearance. The court declared both contracts to be usurious.

Douglass v. M'Chesney, 2 Randolph, 109, was a bill to be relieved from two bonds and a deed of trust, given by the plaintiff to the defendant. The bill states that Douglass applied to M'Chesney to borrow \$500; M'Chesney replied that it was his practice, whenever he lent money, to sell a horse, which Douglass professed his willingness to purchase. Some time afterwards the complainant went by appointment to the house of M'Chesney, who showed him a horse for which he asked \$400. The plaintiff avers that the horse was not worth more than \$80 or \$100, but urged by his necessities, and knowing that he could not get the \$500 from M'Chesney without giving his price for the horse, he assented to the proposal and executed two bonds for the money, which were secured by a deed of trust. When the bonds became due M'Chesney advertised the property for sale, and this bill was brought to enjoin further proceedings and to be relieved.

The testimony proved that the horse was not worth more than \$100, and that it was reported to be M'Chesney's practice, when he lent money, to sell a horse at an exorbitant price to cover a usurious gain. The chancellor dissolved the injunction and the plaintiff appealed. The court of appeals was of opinion that a tacit understanding between the parties, founded on a known practice of the appellee to lend money at legal interest if the borrower purchased of him a horse at an unreasonable price, would be a shift to evade the statute of usury. The decree was reversed, but the court being of opinion that the questions of fact would be decided more understandingly by a jury on *viva voce* testimony, remanded the cause to the court of chancery, with directions to have issues tried to ascertain the value of the horse and whether Douglass was induced to purchase him at the price of \$400 by the expectation of a loan.

The covenants in the deed of the 11th of June, 1814, granting the annuity, have been stated. They secure the payment of ten per cent. forever on the sum advanced. There is no hazard whatever in the contract. Moore must, in something more than twenty years, receive the money which he advanced to Scholfield, with the legal interest on it, unless the principal sum should be re-

turned after five years, in which event he would receive the principal with ten per cent. interest till repaid. The deed is equivalent to a bond for \$5,000, amply secured by a mortgage on real property, with interest thereon at ten per cent. per annum, with liberty to repay the principal in five years. If the real contract was for a loan of money, without any view to a purchase, it is plainly within the statute of usury; and this fact was very properly left to the jury. There is no error in this instruction.

§ 446. *An instruction leaving the contract and all testimony to the jury to determine whether it was a bona fide purchase or a device to cover usury is proper.*

The counsel for the defendant then prayed the court to instruct the jury that if they shall believe from the evidence aforesaid that the land out of which the said rent charge mentioned in said deed from Scholfield to Moore was to issue was in itself, and independently of the buildings upon the same, wholly inadequate and insufficient security for said rent; that then the jury cannot legally infer, from the clause in said deed, containing a covenant on the part of said Scholfield to keep the said houses insured, anything affecting said contract with usury or illegality; which instruction the court refused; whereupon the defendant prayed the court to instruct the jury as follows, to wit: that if the jury shall believe, from the evidence, that the fair and customary price of annuities and rent charges, at the date of the said deed from Scholfield, was in the market of Alexandria ten years' purchase, and so continued for a period of years, then, from the circumstances of the rent being ten per cent. on the amount advanced, the jury cannot legally infer, from such circumstance, anything usurious or illegal in the contract.

But the court refused to grant the said instructions, or either of them, as prayed by the counsel for the defendant; whereupon the said counsel excepted to the said opinion of the court, and its refusal to give either of the said instructions as prayed.

It is obvious that the instructions given by the court, at the prayer of the plaintiff's counsel, cover the whole matter contained in this prayer of the defendant. It is, in truth, an effort to separate the circumstances of the case from each other, and to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one of them amounted in itself to usury. The court ought not to have given this instruction. It was proper to submit the case, with all its circumstances, to the consideration of the jury, and to leave the question whether the contract was, in truth, a loan, or the *bona fide* purchase of an annuity, to them.

There is no error in the opinion of the court refusing the second and fourth instructions prayed by the defendant and avowant in the court below, nor in giving the instructions prayed by the plaintiff in replevin; but this court is of opinion that the circuit court erred in deciding that Jonathan Scholfield was a competent witness for the plaintiff in that court. This court doth, therefore, determine that the judgment of the circuit court be reversed and annulled, and that the cause be remanded to that court, with directions to set aside the verdict and award a *venire facias de novo*.



## MISSOURI VALLEY LIFE INSURANCE COMPANY v. KITTLE.

(Circuit Court for Nebraska: 1 McCrary, 234-238. 1890.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.—Bill in equity brought to foreclose a mortgage upon certain real estate in Nebraska, executed by Robert Kittle and wife to the plaintiff, to secure the payment of a certain promissory note for \$2,500. The defense is that the note sued on is usurious. The legal rate of interest under the law of Nebraska is twelve per cent. per annum, and this rate is contracted for by the terms of the note. It is claimed by the defendant that, in addition to the lawful interest thus provided for, a further consideration for the loan was exacted by the plaintiff under the cover of a transaction of insurance entered into between the plaintiff and defendant Robert Kittle. The plaintiff is a corporation organized under the laws of Kansas, and its purposes are declared by article 4 of its charter, among other things, to be "to make insurance upon the lives of individuals, . . . and to make such legal investments of all moneys received as premiums for policies issued and from other sources as will best promote the interests of all concerned; and, carrying out the objects of said corporation, may loan the money of the corporation at a percentage not exceeding twenty per cent. per annum." It is clear that the company was organized for the purpose of engaging in the business of insuring the lives of individuals and of loaning money, and it does not appear, either from the charter or the evidence, that the loaning of money was merely incidental to the business of insurance. It is pretty evident, I think, that the company looked to the income to be derived from investments and loans as the chief source of its profits; but however this may be, it is safe to assume that loaning money was one of the primary objects for which the company was created.

§ 447. *An agreement, shift or device to take more interest than the law allows is usurious.*

The defendant Robert Kittle applied to the plaintiff for a loan of money. He did not desire, and did not apply for, a policy of insurance upon his life. He was informed in substance that the company was loaning money, and would loan him \$2,500 upon satisfactory security, provided he would take from plaintiff a policy of insurance upon his own life or that of some other person for \$5,000, and pay the premiums, amounting to about \$300 per annum. Whether more than the legal rate of interest has been contracted for is a question of fact to be collected from the whole of the transaction as it passed between the parties. We are to inquire whether there was an agreement, device or shift to reserve or take more than the law permits. It is not usual to express a usurious contract upon the face of a written agreement. "The charge of usury," says Mr. Tyler, "in most instances attaches to pretended cases of exchange of credits or commodities, or when a profit is realized for something besides the use of the money loaned or the debt forborne." Tyler on Usury, 105. We must, therefore, inquire whether, considering the whole transaction, there has been a successful effort on the part of the plaintiff to obtain, under color of the insurance transaction, exorbitant and unlawful gain for the use or forbearance of the money loaned to defendant Robert Kittle. Were these, two separate and independent *bona fide* transactions between the parties—one a loan of money at a lawful rate of interest, and the other the taking by defendant Robert Kittle of a policy of insurance upon his life from

the plaintiff? Or were the two so intermingled as to constitute only one transaction, one result of which was that plaintiff actually received, or contracted to receive, more than twelve per cent. per annum interest as a consideration for the use of the money loaned?

§ 448. *An agreement, in addition to paying legal interest, to take out and pay the premiums upon a policy of life insurance as a part of a consideration for a loan is usurious. (a)*

The evidence, as it appears in the depositions, might leave us in serious doubt as to the true answer to be given to these questions, but the matter is rendered reasonably clear by reference to the mortgage sued on, which must be accepted as an authoritative statement of the contract as understood by the parties themselves, and which provides as follows: "And the parties of the first part hereby agree, in consideration of the aforesaid loan, to take out and keep in force during the continuance of said loan, a policy of life insurance in the Missouri Life Insurance Company aforesaid, upon his own life or the life of some other person, and upon which he hereby agrees to pay or cause to be paid to said company the annual premium thereon, and not less than \$310 per annum. And it is further agreed, in consideration of said loan, that all renewals thereof, or extensions of time of payment thereof, are upon the express condition of the payments upon said life insurance policy being made when due; . . . that any neglect or refusal so to do shall cause the whole amount of said loan to become immediately due and payable, any agreement of renewal or extension of payment to the contrary notwithstanding."

This language is explicit, and from it we learn that the two transactions were, in some respects at least, blended into one. The insurance was taken in consideration of the loan. It was not a clause inserted in pursuance of a policy to loan only to policy-holders, for it stipulates that the policy to be taken may be upon the life of the borrower "or the life of some other person."

It was the profit to be derived from the transaction of insurance that was demanded "in consideration of the loan," it being expressly declared that premiums amounting to not less than \$302 per annum were to be paid to said company. It was further agreed, "in consideration of said loan," that a failure to pay premiums on the policy of insurance should work a forfeiture of all renewals or extensions of time of payment of the loan, and cause the whole amount thereof, both principal and interest, to become immediately due. The contract of insurance was very clearly demanded by the plaintiff as a condition precedent to, and an additional consideration for, the loan of the sum of \$2,500 to defendant Robert Kittle. It was a thing of value to the company — a transaction out of which it was to make a considerable

(a) Where a contract for the loan of money and an agreement for insurance upon the life of the borrower are blended together in the same transaction, and the proof shows that the policy of insurance was taken and a premium paid in advance in consideration of the loan, and that such consideration was over and above the interest allowed by law, the transaction is usurious. It is not necessary in such a case to show that the premiums charged were unreasonable. It will be presumed that there was in the transaction of insurance a profit to the insurance company, the lender; and if, independently of the premium paid in advance, the maximum rate of interest has been charged and taken, the insurance and the payment of a premium in advance, if intended as a condition precedent to, and a further consideration for, the loan, will make it usurious. Thus where the proposition was distinctly made to the borrower, that if he would take out a policy the company would make him a loan, and no loan would have been made except this condition had been complied with, and the borrower would not have taken the policy but for the loan, the transaction was considered to be usurious. *National Life Ins. Co. v. Harvey*,\* 2 McC., 576.

profit; and, as twelve per cent. per annum had been otherwise contracted for and reserved, the agreement for additional compensation for said loan rendered the said loan usurious. To hold otherwise would be not only to disregard the plain terms of the contract, as expressed in the mortgage, but also to point out the way by which insurance companies may easily evade the statutes of the several states prohibiting usury.

In this case the payments which have been made under the name of premiums on the insurance policy must be regarded as paid on account of said loan; the insurance contract, made as it was as a cover for usury, being held void. The statute of Nebraska on the subject of usury in force when this loan was made, to wit, the 18th day of November, 1872, will determine the rights of the parties in view of this opinion, and decree will be entered accordingly.

MILLER, CIRCUIT JUSTICE, concurs.

BANK OF THE UNITED STATES v. OWENS.

(2 Peters, 527-541. 1829.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This suit is instituted for the recovery of a promissory note. The plea is filed by the three last-named defendants, who represent themselves as securities to Owens, and sets out, in substance, that the note was created for the purpose of enabling Owens to obtain a loan of money from the plaintiff, in the ordinary course of discount; that it was offered for discount and rejected, and after such rejection it goes on to aver that "it was unlawfully, usuriously and corruptly agreed by and between the said plaintiffs, by their agents employed in the management and business of the said office, and the said Owens, that they, the said plaintiffs, would receive and discount the said note, and that the said Owens should receive from them therefor, notes of the Bank of Kentucky, or its branches, at the nominal value of said notes, and for the forbearance and loan aforesaid that Owens should pay said note in current money of the United States, when it fell due, with interest at the rate of six per centum per annum, from," etc.; the plea then avers, "that in pursuance of said corrupt and unlawful agreement," this note was passed to the plaintiffs, and Kentucky notes received in loan, "as the sole consideration thereof," at their nominal value; and further, "that at the time the said note was discounted, as aforesaid, the notes of the said Bank of Kentucky and its branches were generally depreciated, so much so that \$100 thereof, nominally, were of the value of \$54 only, or less, and current only at that depreciation, for greater or smaller sums," etc.; and the defendants further aver, "that the said transaction and dealing was contrary to law and the fundamental articles of the said corporation; and the said note, founded upon a corrupt and usurious consideration, the said plaintiffs reserving a greater interest than at the rate of six per centum per annum, upon the value of the notes loaned by them, as aforesaid."

To this plea the plaintiffs demurred, and three points are made on which the court below certify a difference of opinion to this court. The first is, whether the facts set forth and the averments in said plea make out a case on which the corporation has taken more than at the rate of six per centum per

annum, upon a loan or discount, contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation.

The proposition here presented to the court has relation altogether to the violation of the ninth fundamental rule of the act of incorporation, and it brings under consideration the sufficiency both of the facts and averment contained in the plea, to make out a violation of that article.

I have, myself, entertained very serious doubts of the sufficiency of the averments in the plea; for it is not a case of a direct reservation of a higher interest than the law allows, since on the face of the note only six per cent. is reserved; but the facts are calculated to present one of those cases in which a device is resorted to, by which is reserved a higher profit than the legal interest, under a mask thrown over the transaction, to wit, by taking a note payable in gold or silver, for a loan of depreciated paper; a return in fact, in specie, for an article of scarcely half the value of specie; a loan of adulterated dollars, for which a note is taken, payable dollar for dollar in coin of the United States.

That the law will not tolerate such transactions has long been settled, for a fraud upon a statute is a violation of the statute. But the difficulty with me was this: that the plea neither avers an intention to evade the statute, nor a knowledge in the plaintiffs of the actual depreciation of Kentucky money. I am content, however, to unite with the three of my brethren who make up the majority on this point, in holding the averments to be sufficient; because, in a considerable dearth of authorities on this subject, I find it decided in the case of *Button v. Downham*, in *Cro. Eliz.*, 643, that the confession of the *quo animo* implied in a demurrer will affect a case with usury, when a very similar case, in the same book, in which the plaintiff had traversed the plea, was left to the jury with a favorable charge. *Benningfield v. Ashley*, *Cro. Eliz.*, 741.

In the present instance the loan, the unconditional return of the sum lent, the illegality, and even corruption, of the bargain are all distinctly averred, and more than once reiterated. If the transaction was corrupt, and in violation of the fundamental laws of the charter, as averred in the plea, and admitted by the demurrer, it could only have been upon the ground of an intention to evade the statute, and with a knowledge of the reduced value of the Kentucky bills. And it is not unnatural here to remark that the plea sets out a refusal to make a loan in the ordinary course, to wit, in gold or silver, or the plaintiffs' own notes, and a subsequent agreement to make the loan, provided payment would be received in this depreciated paper. This state of facts presents an obvious analogy to the leading case of *Lowe v. Waller*, *Douglas*, 736, in which the negotiation commenced for a loan of money, but terminated in a sale of goods, on the resale of which the borrower (as he was held to be) sustained a great loss. The court charged the lender with that loss, as so much exacted from the necessities of the borrower.

§ 449. *Corruptly and usuriously loaning depreciated bank bills on a note payable in current coin, with legal interest, is in violation of the charter of the Bank of the United States.*

That part of the ninth section of the fundamental rules of the bank charter (3 Stats. at Large, 272) which is here drawn in question is expressed in these words: "The bank shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts."

§ 450. *What transactions are usurious.*

A profit made or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest. According to this principle the lender has here taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. So that in this point the certificate of this court must be in the affirmative.

Some doubts have been thrown out whether, as the charter speaks only of taking, it can apply to a case in which the interest has been only reserved, not received. But on that point the majority are clearly of opinion that reserving must be implied in the word taking, since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. 1 Hawk. P. C., 620. In those instances in which courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offense. But when the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule that it is unlawful to contract to do that which it is unlawful to do.

§ 451. *Upon general principles, a contract to do an illegal act, whether the act be malum in se or malum prohibitum, is void and cannot be enforced.*

The second question propounded to this court is: "Whether if the plea does make out a case of violation of a provision of the charter, the notes sued on, or the contract therein expressed, is void in law, so that no recovery can be had therein in this suit." The question here propounded has relation exclusively to the legal effect of a violation of the provision in the charter on the subject of interest, and does not bring in question the operation of the statute of usury of Kentucky upon the validity of this contract. To understand the gist of the question it is necessary to observe that although the act of incorporation forbids the taking of a greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all, the acts passed in England and in the states on the same subject, declare such contracts usurious and void.

The question, then, is, whether such contracts are void in law, upon general principles. The answer would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummation of violations of law? To enumerate here all the instances and cases in which this reasoning has been practically applied would be to incur the imputation of vain parade. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal. That this is true of contracts violating the laws of morality is recognized in the familiar maxim, *ex turpi causa non oritur actio*, as has been exemplified in some modern cases of a house let for immoral purposes. Cited and admitted in 1 B. & P., 340, and Esp. N. P., 13.

In the case of *Aubert v. Maze*, 2 B. & P., 374, it is expressly affirmed that there is no distinction, as to vitiating the contract, between *malum in se* and *malum prohibitum*. And that case is a strong one to this point, since the contract there arose collaterally out of transactions prohibited by statute. So the same doctrine was maintained in equity upon a similar contract in the case of

Watts v. Brooks, 3 Ves. Jr., 612, in which the court observes: "There is nothing immoral in this transaction, but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued that you can break a law covertly. The court will not execute these contracts."

So, in the case of Webb v. Pritchett, 1 B. & P., 264, where the action was by a tavern-keeper, against a candidate, for provisions furnished to the voters at an election, contrary to the statute of William. Although the statute does not declare the contract void, the court declared it void, and in this explicit language: "This action is apparently founded on a contract to disobey the law." "The defense set up proves the principle of the contract." "Then, how shall an action be maintained in that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum*, of a very serious nature, in the opinion of the legislature; how, then, can we enforce a contract to do that very thing which is so much reprobated by the act?" "This court cannot give any assistance to the plaintiff consistently with the principles which have governed the courts of justice at all times. Persons who engage in such transactions must not bring their cases before a court of law," etc.

So in the case of assurance in illegal voyages, even where the underwriters have contracted with their eyes open, they are, notwithstanding, permitted to avail themselves of the plea of illegality *ad libitum*, as in the cases of Camden v. Anderson, 6 T. R., 723, adjudged in the king's bench, and affirmed in the exchequer, where it is declared that "the defense is founded upon a principle of law which is permanent to all obligation by which the parties to a contract can bind themselves." 1 B. & P., 272. And so, in another case of great hardship, Morek v. Abel, 3 B. & P., 35, where the insurance was upon a trading in the East Indies, prohibited by an obsolete statute, the plaintiff could not even recover back his premium, although admitted that the risk never commenced, because the policy was void in its inception, on the ground of illegality.

Nor is it to voyages illegal by statute alone that this principle applies. A respectable writer on insurance makes these remarks: Whenever an insurance is made on a voyage expressly prohibited by the common, statute or maritime law of the country, the policy is of no effect. The principle on which such a regulation is founded is not peculiar to this kind of contracts, for it is nothing more than that which destroys all contracts whatsoever (Park, 232), that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt it, it is invalid, and will not receive the assistance of a court of justice to carry it into execution.

Nor is the rule applicable only to contracts expressly forbidden, for it is extended to such as are calculated to affect the general interest and policy of the country. Thus, a note given by a bankrupt upon a secret compromise with a creditor is declared void, as it produces inequality in the distribution of the bankrupt's effects, and evades the provisions and policy of the law, which proposes to put all the creditors upon an equal footing. Wells v. Girling, 1 Brod. & Bing., 447. And on the same principle, a note given for a wager on the future amount of a branch of the public revenue is declared void, because it interests an individual in diminishing the production of the revenue. 2 T. R., 610; 2 B. & P., 130.

After citing these more modern decisions upon this subject, it may not be amiss to refer to some reporters, whose authority has been consecrated by the respect of ages. They will serve to show the antiquity and universality of

this doctrine. Thus, in 1 Bulls., 38, it is laid down "that wherever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration, be unlawful, the whole contract is void." So in Hobart, 72, and Dyer, 356, "if one promises to do a thing that is unlawful, such promise is void."

And innumerable ancient cases might be cited from the best reporters of the application of the rule to maintenance, to simony, and to promises made to public officers, engaging them to act contrary to the duties of their offices, or to individuals imposing upon them restraint inconsistent with the public interest. For these reasons, and upon these decisions, the majority of the court are of opinion that an affirmative answer must also be certified upon the second question in the cause. And this renders it unnecessary to consider the third question.

BANK OF THE UNITED STATES *v.* WAGGENER.

(9 Peters, 378-404. 1835.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the district of Kentucky to revise a judgment of that court, in a case where the plaintiffs in error were original plaintiffs in the suit. The suit was an action of debt brought upon a promissory note, dated the 7th of February, 1822, whereby the defendants, on or before the 7th of February, 1825, jointly and severally promised to pay the president, etc., of the Bank of the United States, at their office of discount and deposit, at Lexington, \$5,000 with interest thereon, after the rate of six per cent. per annum, until paid, for value received. And by a memorandum on the back of the note, the interest was to be charged only from the 21st of May, 1822; that being the day on which the money was actually received by the makers of the note.

The plea of payment was put in, upon which issue was joined; and it was agreed between the parties, that either party under the issue might give in evidence any special matter which could be specially pleaded. At the trial a verdict was rendered for the defendants, upon which judgment passed in their favor; and the cause is now brought before us for revision, upon a bill of exceptions taken at the trial, and for matters of law therein stated.

From the evidence at the trial, it appears that prior to the time when the note was given, namely, in 1819, the Bank of Kentucky, which had previously been in high credit, suspended specie payments; and at that time the institution was indebted to the plaintiffs, the Bank of the United States, in a large sum of money, for notes of the Bank of Kentucky, taken at par, in the usual course of business, and for government deposits transferred to the office at Lexington from the Bank of Kentucky and its branches. The accounts had been settled between the two institutions, the balance ascertained and placed to the credit of the plaintiffs, on the books of the Bank of Kentucky as a deposit; upon which the Bank of Kentucky agreed, in consideration of forbearance, to pay interest at the rate of six per cent. per annum; and the interest, as it accrued, was carried, at stated intervals, to the credit of the plaintiffs, on the books of the bank. This agreement was punctually performed by the Bank of Kentucky, and the balance which remained due to the plaintiffs was finally settled and discharged in specie, or its equivalent, in about seven months after the negotiation, which will be immediately noticed.

In this state of things, Owens, one of the defendants, made repeated applications to the Lexington office of the Bank of the United States, for an accommodation of \$5,000, in Kentucky bank-notes, of which the office had a considerable sum on hand; stating that such notes would answer his purpose as well as gold or silver, and agreeing to receive them at their nominal amounts. These applications were rejected; and finally, at his urgent suggestions, an application was made to the parent bank at Philadelphia, to permit the Lexington office to grant the application; and the parent bank accordingly gave the permission. The note now in suit was accordingly given, with a mortgage of real estate as collateral security; and \$1,100 were received in Kentucky bank-notes, and the remaining \$3,900 were paid by a check drawn on the Bank of Kentucky, which was duly honored; and the amount of the check was deducted from the balance due to the plaintiffs, and interest thereon immediately ceased.

If further appeared, at the trial, that the Bank of Kentucky was never insolvent, but had always sufficient effects to pay its debts; that it has been several times sued for its debts, which had been always paid in specie, or other arrangements had been made satisfactory to the creditors; it had discharged the greater part of its debts, and had distributed among its stockholders \$10 in specie and \$70 in notes of the Commonwealth Bank of Kentucky (which were at a great depreciation), and that all its funds had not yet been distributed. The Bank of Kentucky never resumed specie payments, and at the time of the negotiation above stated the notes were depreciated from thirty-three to forty per cent., and were current as a circulating medium at this rate of depreciation. They were, however, by law, receivable for state taxes and county levies at par, and had, accordingly, been so received.

Upon this evidence the plaintiffs moved the court to instruct the jury as follows:

"1. That if they believed, from the evidence, that the consideration of the note sued on was \$3,900 paid in check on the Bank of Kentucky, and \$1,100 in Kentucky bank-notes; and that the contract was fairly made, without any intention to evade the laws against usury, but that the parties making the contract intended to exchange credits for the accommodation of Owens; that the Bank of Kentucky was solvent, and so understood to be, and able to pay all its debts by coercion,—that the contract is not void for usury, nor contrary to the fundamental law or charter of the bank, notwithstanding it was known to the parties that said bank did not pay specie for its notes without coercion; and that the difference in exchange between bank-notes of the Bank of Kentucky, and gold and silver, was from thirty-three to forty per cent. against the notes of the Bank of Kentucky.

"2. To instruct the jury that, if they believed from the evidence that the contract was made on the part of the bank fairly, and with no intention to avoid the prohibition of their charter, by taking a greater rate of interest than six per cent., or the statutes against usury, but at the instance and for the accommodation and benefit of the defendant Owens; and that at the time of the negotiation and contract for the check on the bank, and the \$1,500 in bank-notes of the Bank of Kentucky, the Bank of Kentucky was indebted to the Bank of the United States, at their office aforesaid, the sum of \$10,000 or more, bearing an interest of six per cent.; which sum, it was understood and believed by the parties to the contract, at and before its execution; the Bank of Kentucky, with interest, was well able to pay, and which sum it did pay, after de-



ducting the \$3,900 paid to the defendant Owens, with interest in gold or silver, or its equivalent,—that the contract was not usurious, unless they believe that the contract was a shift or device entered into to avoid the statute against usury, and the prohibition of the charter, notwithstanding the jury should find that the check and notes aforesaid were, in point of fact, of less value than gold and silver.

“3. If the jury find from the evidence in the cause that the defendants applied to the plaintiffs to obtain from them \$5,000 of the notes of the president, directors and company of the Bank of Kentucky; and in consideration of their delivering, or causing to be delivered, to the defendants \$5,000 of such notes; and the said Bank of Kentucky was then solvent and able to pay the said notes, and has so continued up to this time; and that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with six per centum per annum interest thereon, from the time of the delivery of them by plaintiffs to defendants, up to the time of such recovery; and that said arrangement and contract was not made under a device, or with the intent to evade the statutes against usury, or to evade the law inhibiting the plaintiffs from receiving or reserving upon loans interest at a greater rate than six per centum per annum,—then the transaction was not in law usurious or unlawful, and the jury should find for the plaintiffs.

“4. That unless the jury find, from the evidence in the cause, that the advance sale or loan of the notes on the Bank of Kentucky, made by plaintiffs to defendants, was so made as a shift or device to avoid the statute against usury, or in avoidance of the clause of the act of congress which inhibits the plaintiffs from taking or receiving more than at the rate of six per centum per annum for the loan, forbearance, or giving day of payment of money, the law is for the plaintiffs, and the jury would find accordingly.

“5. That unless they believe, from the evidence in this cause, that there was a lending of money, and a reservation of a greater rate of interest than at the rate of six per centum per annum, stipulated to be paid by defendants to plaintiffs, the law is for the plaintiffs, and the jury should find for them; unless they further find that there was a shift or device resorted to by the parties with the intent and for the purpose of avoiding the law, by which something other than money was advanced, and by which a greater rate of interest than six per cent. was allowed.

“6. That if the defendants applied to the plaintiffs for a loan of \$5,000 of the notes of the Bank of Kentucky, and agreed to give therefor their note for \$5,000, payable three years thereafter, with interest, and the Bank of Kentucky was then, and continued thereafter to be, solvent, and the said Bank of Kentucky did thereafter pay and discharge to the holders thereof the said notes, the said contract was not unlawful, although the notes of the Bank of Kentucky would not then command, in gold or silver, their nominal amount when offered for sale or exchange as a commodity or money.

“7. That if they find from the evidence that the defendants obtained from the plaintiffs \$5,000 of the notes of the Bank of Kentucky, or \$3,900 in a check upon said bank, and \$1,100 of its notes, and in consideration thereof made the note sued upon, the said transaction was not therefore unlawful or usurious, although the notes of the Bank of Kentucky were then at a depreciation in value of thirty-three per cent. in exchange for gold and silver.

“8. That there is no evidence in this cause conducing to prove that there

was a loan by the plaintiffs to the defendants of notes on the president, directors and company of the Bank of Kentucky."

The court refused to give any of these instructions; and upon the prayer of the defendants instructed the jury as follows:

"That if they find from the evidence that the only consideration for the obligation declared upon was a loan made by the plaintiffs to Owens of \$5,000, in notes of the Bank of Kentucky, estimated at their nominal amounts, part paid in the notes themselves, and the residue in a check drawn by the plaintiffs on the Bank of Kentucky, on the understanding and agreement that the said Owens was to receive the notes on said bank in payment thereof, and he accordingly did so; that the Bank of Kentucky had, before that time, suspended specie payments, and did not then pay its notes in lawful money; that the said notes then constituted a general currency in the state of Kentucky, commonly passing in business and in exchange at a discount of between thirty and forty per cent. below their nominal amounts, and could not have been sold or passed at a higher price; that the said facts were known to the plaintiffs and said Owens, yet the plaintiffs passed the said notes to the said Owens, the borrower, at their nominal amounts,—then the transaction was in violation of the act of congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendants."

The statute of usury of Kentucky of 1798 declares that no person shall hereafter contract, directly or indirectly, for the loan of any money, wares, merchandise or other commodity above the value of £6 for the forbearance of £100 for a year; and after that rate, for a greater or a lesser sum, or for a longer or shorter time; and all bonds, contracts, etc., thereafter made for payment or delivery of any money or goods so lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void. This clause of the act is substantially a transcript of the statute of 12 Anne (Stat. 2, ch. 16, § 1), and, therefore, the same construction will apply to each. In the present case no interest at all has been taken by the plaintiffs on the \$5,000. There was no discount of the accruing interest from the face of the note, and the interest was payable only with the principal, at the termination of the three years mentioned in the note. If the case, therefore, can be brought within the statute, it must be not as a taking, but as a reservation of illegal interest.

The ninth article of the fundamental articles of the charter of the Bank of the United States (3 Stats. at Large, 272; act of 1816, ch. 44, § 11) declares, among other things, that the bank "shall not be at liberty to purchase any public debt whatsoever; nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts." It is clear that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article, according to the interpretation thereof given by this court in *Fleckner v. The Bank of the United States*, 8 Wheat., 338, 351 (BANKS, §§ 20-27), to which we deliberately adhere.

§ 452. *A reservation of usurious interest makes the contract void. But if usurious interest be not stipulated for, but only taken afterwards, the contract is not void, but the party is liable to the penalty.*

It is observable that the words of the article are, that the bank shall not take (not shall not reserve or take) more than at the rate of six per cent. In the construction of the statutes of usury this distinction between the reserva-

tion and taking of usurious interest has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, there the contract is not void, but the party is only liable to the penalty for the excess. So it was held in *Floyer v. Edwards*, Cowp., 112. But in the case of *The Bank of the United States v. Owens*, 2 Pet., 527, 538 (§§ 449–51, *supra*), it was said that, in the charter, “reserving” must be implied in the word “taking.” This expression of opinion was not called for by the certified question which arose out of the plea; for it was expressly averred in the plea, that, in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value.

§ 453. *There must be an intention to take unlawful interest to constitute usury.*

It is in reference to the usury act of Kentucky and this article of the bank charter that the various instructions asked or given are to be examined. But before proceeding to consider them severally it may be proper to remark that, in construing the usury laws, the uniform construction in England has been (and it is equally applicable here) that to constitute usury within the prohibitions of the law there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement.

§ 454. *Where the contract on its face calls for usury, this is the end of inquiry; otherwise the inquiry is for some agreement, device or shift, dehors the written contract.*

Where, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; for the intent is apparent, *res ipsa loquitur*. But where the contract, on its face, is for legal interest only, there it must be proved that there was some corrupt agreement or device, or shift, to cover usury; and that it was in the full contemplation of the parties. These distinctions are laid down and recognized so early as the cases of *Button v. Downham*, Cro. Eliz., 643; *Beddingfield v. Ashley*, Cro. Eliz., 741; *Roberts v. Tremayne*, Cro. Jac., 507. The same doctrine has been acted upon in modern times, as in *Murray v. Harding*, 2 W. Bl., 859; where Gould, J., said that the ground and foundation of all usurious contracts is the corrupt agreement; in *Floyer v. Edwards*, Cowp., 112; in *Hammett v. Yea*, 1 Bos. & Pull., 144; in *Doe v. Gooch*, 3 Barn. & Ald., 664; and in *Solarte v. Melville*, 7 B. & Cres., 431.

The same principle would seem to apply to the prohibition in the charter of the bank. There must be an intent to take illegal interest, or, in the language of the law, a corrupt agreement to take it, in violation of the charter; and so it was stated in the plea in the case of *The Bank of the United States v. Owens*, 2 Pet., 527 (§§ 449–51, *supra*). The *quo animo* is, therefore, an essential ingredient in all cases of this sort.

Now, it distinctly appears in the evidence, as has been already stated, that no interest or discount whatsoever was actually taken on the note; and on the face of the note there was no reservation of any interest but legal interest. So that there has been no taking of usury and no reservation of usury on the face of the transaction. The case, then, resolves itself into this inquiry: whether, upon the evidence, there was any corrupt agreement, or device, or

shift, to reserve or take usury; and in this aspect of the case, the *quo animo*, as well as the acts of the parties, is most important.

§ 455. *The fact that a note was given for bank bills which were thirty per cent. below par did not constitute usury.*

With these principles in view, let us now proceed to the examination of the instructions prayed by the plaintiffs. The substance of the first instruction is that if the contract was fairly made by the parties, without any intention to evade the laws against usury, but that the parties, making the contract, intended to exchange credits for the accommodation of Owens; that the Bank of Kentucky was solvent, and able to pay its debts by coercion,—then the contract was not void for usury, nor contrary to the charter of the bank, notwithstanding the parties knew that the Bank of Kentucky did not pay specie for its notes without coercion; and that these notes were in exchange at a depreciation of from thirty-three to forty per cent. below par.

§ 456. — *it was an exchange of credits, bona fide made, and not a usurious discount.*

We are of opinion that this instruction ought to have been given. It excludes any intention of violating the laws against usury; and it puts the case as a *bona fide* exchange of credits for the accommodation of Owens. Such an exchange is not *per se* illegal; though it may be so, if it is a mere shift or device to cover usury. If the application be not for a loan of money, but for an exchange of credits or commodities, which the parties *bona fide* estimate at equivalent values, it seems difficult to find any ground on which to rest a legal objection to the transaction. Because an article is depreciated in the market; it does not follow that the owner is not entitled to demand or require a higher price for it before he consents to part with it. He may possess bank-notes, which to him are of par value, because he can enforce payment thereof, and for many purposes they may pass current at par, in payments of his own debts, or in payment of public taxes; and yet their marketable value may be far less. If he uses no disguise, if he seeks not to cover a loan of money under the pretense of a sale or exchange of them, but the transaction is, *bona fide*, what it purports to be, the law will not set aside the contract, for it is no violation of any public policy against usury.

§ 457. *Where there was no usurious intent and no contract or agreement for usury, there was no usury.*

We are also of opinion that the second instruction ought, for similar reasons, to have been given; and, indeed, it stands upon stronger grounds. It puts the case that there was no intention to violate the charter or the statute against usury; that the contract was for the accommodation of Owens; that the Bank of Kentucky was indebted to the plaintiffs in a sum exceeding \$10,000, bearing an interest of six per cent. (which the check would reduce *pro tanto*); that the Bank of Kentucky was able to pay the amount with interest in gold or silver, and did pay it, after deducting the check of \$3,900; and then asserts that, under such circumstances, the contract was not usurious, unless the jury believe that the contract was a shift or device entered into to avoid the statute against usury; notwithstanding the check and the bank-notes were, in point of fact, of less value than gold and silver. So that in fact it puts the instruction upon the very point upon which the law itself puts transactions of this sort—the *quo animo* of the parties. Did they intend usury, and make use of any shift or device to cover a loan of money? Or did

they, *bona fide*, intend a loan of bank-notes, which, to the lender, were of the full value of their numerical amount, and were so treated *bona fide* by the borrower? Unless the court were prepared to say (which we certainly are not) that all negotiations for the sale or exchange of bank-notes, under any circumstances, must, to escape the imputation of usury, or the prohibition of the charter, be merely at their marketable value at the time, though worth more to both parties, the instruction was, in its terms, unexceptionable.

The third instruction is governed by the same reasoning. It puts the case, that the application was made for a loan, not of money, but for notes of the Kentucky Bank, to the amount of \$3,000, in consideration of the note sued on; that the Bank of Kentucky was solvent and able to pay its notes; that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with interest at the rate of six per cent. per annum; and that there was no device or intent to evade the statute against usury, or the prohibition of the charter; and then asserts that, under such circumstances, the transaction was not, in law, usurious. And here it may be added, that, if the case was as stated (and the evidence manifestly conduced to establish it), it is clear that the plaintiffs could not, by the negotiation, entitle themselves to more interest than they were already entitled to against the Bank of Kentucky. It would be a mere exchange of securities by which the plaintiffs did not reserve and could not obtain more than the legal rate of interest. If A. holds the note of B. for \$100 and legal interest, and he exchange it with C. for his note for the same sum and legal interest, and B. and C. are both solvent, the transaction in no manner trenches upon the statute against usury.

The fourth instruction puts the case in a more general form, but the same principles apply to it. The fifth instruction puts the case in the most pointed manner, whether there was an intended loan of money and a reservation of illegal interest, and a shift or device to cover it, and evade the law by advancing something other than money on the loan. If there was not, then it asserts (and in our judgment correctly) that the jury ought to find for the plaintiffs. The sixth and seventh instructions fall under the same considerations, and are equally unexceptionable.

§ 458. *Where there is evidence proper for the consideration of the jury on any question of fact involved, an instruction that there is no evidence conducing to prove the fact is error.*

The eighth instruction was properly refused, and ought not to have been given. The court could not judicially say that there was no evidence conducing to prove that there was a loan by the plaintiffs to the defendants of the notes of the Bank of Kentucky. There was evidence proper for the consideration of the jury; and the intent was to be gathered by them from the whole circumstances of the transaction.

In regard to the instruction given by the court upon the prayer of the defendants, it was probably given under the impression that the case was governed by the decision of this court in *The Bank of the United States v. Owens*, 2 Pet., 527 (§§ 449-51, *supra*). That case, however, in our opinion, turned upon considerations essentially different from those presented by the present record. The questions certified in that case arose upon a demurrer to a plea of usury, and the demurrer in terms admitted that the agreement was unlawfully, usuriously and corruptly entered into; so that no question as to the intention of the parties, or the nature of the transaction, was put. The transaction was usurious, and the agreement corrupt; and the question then

was whether, if so, it was contrary to the prohibitions of the charter, and the contract was void. In the present case, the questions are very different. Whether the agreement was corrupt and usurious, or *bona fide*, and without any intent to commit usury or to violate the charter, are the very points which the jury were called upon, under the instructions asked of the court, to decide. The decision in 2 Pet., 527, cannot, therefore, be admitted to govern this; for the *quo animo* of the act, as well as the act itself, constitute the gist of the controversy.

§ 459. *On a question of usurious intent it is error to exclude from the jury the consideration of the bona fides of the transaction.*

In our opinion, the instruction asked by the defendants ought not to have been given. It excludes altogether any consideration of the *bona fides* of the transaction, and the intention of the parties, whether innocent or usurious; and puts the bar to the recovery (after selecting a few facts) substantially upon the ground that the bank-notes loaned were a known depreciated currency, passing in exchange and business at a discount of from thirty to forty per cent., and were passed at their nominal amounts by the plaintiffs to the defendants; without any reference to the fact whether there was any design to commit usury, or whether the notes were in reality of a higher intrinsic value, or of their full nominal value to the parties, or whether there was in the transaction either a taking or a reservation of more than six per cent. interest contemplated by the parties. From what has been already stated, these constituted the turning points of the case; and the instruction could not properly be given without making them a part of the inquiries before the jury, upon which their verdict was to turn.

Upon the whole, we are of opinion that the first seven instructions prayed by the plaintiffs ought to have been given to the jury; and the instruction given by the court at the request of the defendants ought to have been refused; and therefore, for these errors, the judgment ought to be reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo*.

DE WOLF v. JOHNSON.

(10 Wheaton, 367-395. 1825.)

APPEAL from U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This cause has been discussed very much at large, and with a degree of talent, candor and research very satisfactory to the court. In proceeding to consider it, however, we think it advisable to deviate from the order in which the points were examined at the bar, and to pursue them as they arise in the progress of the suit.

In the year 1818 the complainant filed his bill in the circuit court of the United States for Kentucky, to obtain a foreclosure of a mortgage given to secure the sum of \$62,000, and bearing date July 7, 1817. The debt secured was payable by instalments, only one of which was due when the bill was filed, but in the progress of the cause all the instalments falling due, they were all, by consent, admitted into the pleadings, as if introduced by supplemental bill.

The bill first sets out the mortgage and the breach, and then proceeds to allege that Prentiss, the mortgagor, had conveyed his equity of redemption to

W. J. Barry, who had sold to James Johnson and R. M. Johnson, the two latter of whom were then in possession.

Prentiss files no answer, and in due course the bill, as to him, is ordered to be taken *pro confesso*. James Johnson files an answer, claiming as *bona fide* purchaser for a valuable consideration, and setting up the defense of usury in the contract between Prentiss and the complainant, and putting the complainant generally upon his proof. He also denies notice of De Wolf's mortgage, otherwise than by vague report, which report, he alleges, was accompanied with the suggestion that the mortgage to De Wolf was affected with usury and void.

At a subsequent day, Barry also answers, admitting the conveyance to himself by Prentiss, in trust to sell; which sale, he alleges, he had effected publicly and in good faith before the bill was filed; and in pursuance of such sale had conveyed to the Johnsons. He further alleges that, at the time of the execution of the deed of trust to him, "he was ignorant of the complainant's claim, except so far as that claim is recognized in the deed of trust," and also sets up the usury between the mortgagor and mortgagee, in avoidance of the mortgage.

R. M. Johnson also files an answer, in which he recognizes and adopts the answer of James Johnson, and further denies, altogether, knowledge of the mortgage to De Wolf at the date of the transfer to Barry. He then sets out that he is a creditor of Prentiss to the amount of near \$500,000, for which he has no other security than the assignment to Barry, through which he derives title to the mortgaged premises.

Upon this state of the pleadings, with a few formal and immaterial additions, the parties went into their proofs. And as the complainant exhibited his mortgage in legal form, and with all the evidence of authenticity required by law, it followed that the defendants were put upon their proof to maintain the grounds on which they sought to avoid it.

It was not contended that, in the immediate contract on which the bill was founded, there was any usurious taint belonging to that transaction itself. The ground taken was usury in a transaction anterior by two years, out of which the mortgage in question drew its origin, and from which the usurious taint was supposed to be transmitted either directly or incidentally. The case proposed to be established in proof was that in the year 1815 there was a negotiation for a loan between these parties, the scene of which was in Bristol, Rhode Island. That the sum to be loaned was \$83,000, but which sum, in fact, was reduced below \$80,000, by means which they contended were resorted to for the purpose of disguising the usurious interest, to be retained by way of premium, or bonus, or imposition. That the interest actually stipulated for was twelve per cent., of which six per cent. was reserved in a bond executed at the time for \$111,000, comprising compound interest, there being no annual interest reserved. The other six per cent. was secured under the aspect of a rent payable out of lands in Kentucky, for which Prentiss executed absolute conveyances, and De Wolf stipulated to reconvey on the payment of the amount for which Prentiss gave his bond, and a sum annually, by way of rent, equal to six per cent. upon the \$83,000, that is, the sum of \$4,980.

This rent, it seems, was paid the first year, together with an additional sum of \$498, added as interest and damages. And a bill for the sum of \$4,980 was drawn the second year by De Wolf upon Prentiss, payable in Philadelphia,

but this was returned under protest, and subsequently taken up by a bill for \$5,154, indorsed by J. T. Meder, Jr.

The evasion of the statute against usury, supposed to have been practiced upon Prentiss in making up the sum of \$83,000, had relation to three items. The first a sum of about \$32,000, admitted into the computation as the price set upon fifteen shares of the Lexington Manufacturing Establishment, transferred by De Wolf to Prentiss. The second, treasury notes to the amount of \$20,211.94, received at par; and the third, \$30,802.73, bills drawn upon Philadelphia, also taken at par. Upon these three items there was an estimated loss sustained of about \$3,400.

The contract of 1815 was unquestionably entered into in the state of Rhode Island, and was there reduced to writing, but had a view to Kentucky for its consummation. As it entered into the contract that Prentiss should secure De Wolf by a conveyance of Kentucky land to a large amount, two agents were employed and intrusted by De Wolf with the securities to be passed to Prentiss, and a power to draw upon him for the money, to be paid in Philadelphia, which Prentiss was to have the benefit of, upon complying with the articles of his contract, purporting an absolute conveyance of the land. The place where the contract of repayment of the principal on the part of Prentiss was to be fulfilled appears no further than this, that the bond is given to pay generally, without regard to place; and the money to be paid by way of rent appears by the subsequent acts of the parties respecting the bills drawn for the rent, to have been payable in Philadelphia.

The contract of 1817, in which this mortgage originated, was executed in Kentucky, and had its inception in an intimation from Prentiss of a design to avail himself of the plea of usury. Upon this De Wolf repaired to Kentucky, and there instituted a new negotiation with Prentiss personally, having for its object to clear the contract from all usurious incidents, and to take security for the sum loaned, at the legal interest of Kentucky, which, as well as that of Rhode Island, is six per cent. Accordingly, all the instruments of writing which appertained to the old contract were surrendered mutually, and a new mortgage given to secure the balance now sued for; the original sum having been reduced by large actual payments to the sum for which this mortgage was given, and which includes the same premises conveyed under the prior contract.

§ 460. *A contract is governed by the law of the state in which it is made, although it be stipulated that the debt contracted shall be secured by a mortgage upon lands situated in another state.*

The defense set up rests upon the assumption that the new contract was not purged of the usury; or rather that the whole contract of 1815 was void, and could, therefore, form no basis or consideration for the contract of 1817. Or if not wholly void, it comprised several items of a usurious character, which ought to be included in the new contract. And here two preliminary questions arose, the first of which was, whether the *lex loci* of the contract of 1815 was Rhode Island or Kentucky? By the usury laws of the latter, the contract and all the securities given for it are void, both for principal and interest. By the laws of the former, although it is prohibited to take more than six per cent. interest, and a penalty imposed for the offense, the act does not render the contract void, certainly not for the principal sum. By the laws of Kentucky, it is supposed that the principal debt being abolished, there could be no



consideration to sustain the new contract; by the laws of Rhode Island, that the reverse would be the effect; unless, as was contended in argument, that the simple prohibition of such a contract, which is express in the Rhode Island act, would affect it with the character of an illegal contract, and as such, one which a court of equity would not lend its aid to carry into effect.

§ 461. *Taking a foreign security does not change the locality of the contract with reference to the interest.*

With regard to the locality of the contract of 1815, we have no doubt that it must be governed by the law of Rhode Island. The proof is positive that it was entered into there, and there is nothing that can raise a question but the circumstance of its making a part of the contract that it should be secured by conveyances of Kentucky land. But the point is established, that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan, on the part of the borrower, is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgagee, unless made in Rhode Island. On a bill to redeem, a court of equity would not have listened to the idea of calling the mortgagee to Kentucky in order to receive a tender.

§ 462. *A defendant, although insolvent, with little or no interest in the event of the suit, is not a competent witness in favor of his co-defendant. Being a party to the record he cou'd not be examined.*

In the effort to sustain his defense under the laws of Rhode Island, the defendants have introduced into the cause the examination of their co-defendant Prentiss, taken at the instance of themselves, and received in the court below subject to legal exceptions. We are not informed whether the court below actually recognized it as competent evidence, since the grounds on which that court dismissed the bill are not spread upon the record. It is enough that it does not appear to be rejected; we are now called upon to pass an opinion upon it.

The only grounds upon which an argument has been made in support of the admissibility of Prentiss' deposition have been that the complainant avers him to be insolvent, which fact the testimony in the cause goes also far to establish; and that his deposition was taken before he was in reality made a party by the service of a subpoena. But on no principle can his evidence be adjudged competent. It is true that cases occur in which certificated bankrupts are struck out of a record and made witnesses; but if this was a case in which a motion to strike out could have been sustained, the motion should have been made, and the party's name expunged from the record. On no principle could he be made a witness while he was himself a party. He may have had little or no interest in the event of the suit, except as to the costs; but still, while a party to the record, he could not be examined. We know of no exception to this rule, whatever be the court in which the question occurs, except it be in the administration of certain branches of the admiralty jurisdiction. From the views that we take of the case, however, we do not find it necessary to inquire whether there is sufficient evidence in the cause after rejecting the evidence of Prentiss, to sustain the facts on which the defense

rests. If, with the aid of that testimony, the defense cannot be sustained, *a fortiori* it cannot be without it. And here it may be proper to premise, as was very correctly remarked in the argument, that there has not been, in fact, any contrariety of opinion expressed by the counsel on the law of usury. Usury is a mortal taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender. But one difficulty presents itself here of no ordinary kind. It is not very easy to discover how the taint of Rhode Island usury can infuse itself into the veins of a Kentucky contract. The defense would not admit of a moment's reflection if it rested on the direct effects which laws against usury have upon contracts. Whatever sums may have been derived through the usurious contract of 1815, to the contract of 1817, they would not affect the latter with usury, unless introduced in violation or evasion of the laws of Kentucky, for the two contracts are governed by laws that have no connection. But it makes very little difference in this case, since, if the contract of 1817 is, either in whole or in part, unconscionable, this court would not lend its aid to execute it as far as it was unconscionable, and the argument goes to show that it partakes of that character, because, admitting that the law of Rhode Island did not render the contract of 1815 null and void for the principal sum loaned, yet the sum exhibited in that contract as principal, and so transmitted to the latter contract, contained sundry items, which it is contended were passed upon Prentiss at a great loss, and under circumstances calculated to serve as a disguise to usury.

And first, as to the shares in the Lexington Manufacturing Company; these were fifteen in number, and appear to have been taken by Prentiss on account of the \$83,000, about \$2,000 a share. The whole of which, there is reason to think, was sunk in his hands, in the general wreck of the adventure.

It cannot be denied that this is a suspicious item; it does not, in general, comport with a negotiation for a loan of money, that anything should enter into the views of the parties but money, or those substitutes which, from their approximation to money, circulate with corresponding, if not equal, facility. Still, however, like every other case, it is open to explanation, and the question always is, whether it was or was not a subterfuge to evade the laws against usury. And here it is to be observed that it is not every sale which, in a negotiation for a loan, will taint the transaction with usury; for it may comport perfectly with the general views of the borrower to make such a purchase, or to take the article even in preference to money. I would illustrate this by the case of a merchant who proposes to borrow a capital to adventure in trade, and who, instead of money, receives an assortment, at a fair price, adapted to that trade. There would be no ground for attributing to such a transaction a design to evade the statute. But in what does the present case vary from that? Prentiss had embarked in a manufactory, of the prospects of which he entertained the highest hopes. He either believed, or endeavored to persuade others, that it would yield fifty per cent. The De Wolfs had embarked, on his representations, \$30,000 in the enterprise. No experiments had been yet made from which any doubts could be excited, nor is there any proof that the stock was falling. Under these circumstances, he proposes to take back the shares if he could procure money to complete the establishment. The connection between the actual loan, and taking the shares as part of the loan, was easy and natural, and the interest of twelve per cent., with other

incidental advantages held out for the loan, may well be estimated as the actual inducement, without supposing that De Wolf was conscious of passing this item upon Prentiss at an inflated price. Prentiss had himself put a value upon these shares but a short time before, in the sale to De Wolf, at nearly the same price, and De Wolf was either his dupe or the shares were resold at their value. Prentiss' continuing confidence in their value is positively deduced from the efforts he made to complete, at every hazard and sacrifice, the establishment to which those shares appertained. He still thought it a profitable investment, and so had De Wolf thought it, or he would not have made so large an investment without an atom of security but what was to be found in his anticipations from the establishment itself. It is conclusive that this was no heterogeneous disconnected article, forced into the negotiation, but intimately connected with, if not the primary object of, the loan; that the price, however inflated, was that which both parties had, by previous unequivocal acts, set upon it; and if it could be said to have a market value, there is no evidence that it was above its market value; and, finally, that it was an actual transfer of interest with a view to acquire the article, and not merely to throw it upon the market in order to raise money. It was a real transaction, and not a subterfuge.

On the subject of the treasury notes and bills drawn on Philadelphia, we can perceive nothing usurious or even unconscionable in this part of the transaction. As to treasury notes, they were thrown into circulation as money, and it is a historical fact that they were worth all they purported to be worth, notwithstanding the casual depreciation which the embarrassments of the country and the scarcity of gold and silver may have produced; and as to the bills of Philadelphia, we are induced to believe that payment in that form was a benefit conferred on the borrower. From the well-known course of trade between Kentucky and Philadelphia, it would scarcely have been possible at that time, or perhaps at any time, to have suited them better in making a payment of money intended to be transported to and used in Kentucky. With regard to the bills, it is in evidence that there was no loss incurred; and, on the treasury notes, not as much as the transportation of gold and silver would have cost, calculating all the incidents to actual transportation. But what if these payments had been made in Rhode Island bank-bills? Would there have been a pretext of lurking usury in such a payment? Yet who can doubt that the payment would have been less convenient than that actually made? In all probability, with reference to gold and silver and the exchange or depreciation in Kentucky, the paper of Rhode Island would have been equally, if not more, disadvantageous. It is not on such vague and equivocal grounds that courts infer the presence of usury. But there is one consideration with reference to this part of the cause which is conclusive. There is no evidence in the record that these payments were in any way forced upon Prentiss. On the contrary, for anything that appears in the evidence, it may have been, in both instances, the payment of his own choice. In a letter not long before the loan, he actually quotes bills on Philadelphia from four to six per cent. advance. Nothing of that chaffering appears in the cause, which distinguishes all the cases in which attempts are made to evade usury laws at the moment of extorting extravagant profits on the advance of money.

With regard to the two payments made by way of rent, we have to remark that there never was any payment of interest for two years on the \$83,000, besides what was made in that form; and had the payments been direct and

absolute, and confined to the sum of \$4,890 each, there could no question have been raised respecting those payments. They would have amounted only to the legal compensation for the use of the money. With regard to the second year, it is obvious that as yet nothing has been actually paid; but as it may be said to be secured or acknowledged by another bill, we will consider both sums as paid. And then the only exceptionable parts of the payment will be the sum of \$498 added to that actually paid for the first year, and \$174.30 added to the bill drawn for the rent of the second year. As to the cash, it is a simple allowance of interest upon a bill drawn for the \$4,980 upon its being returned and taken up by another, and cannot be excepted to. And, as to the first, we perceive in the transaction about the second payment a sufficient explanation of the origin of the addition made in that instance. As Prentiss acquiesced in having a bill drawn for the second year, payable in Philadelphia, we may reasonably conclude that the agreement was to pay the rent or interest, whichever it may be called, by drawing such a bill. If, then, such a bill was drawn and returned for non-payment, it may afford an easy solution of the question upon what principle that addition was made.

But why, for so inconsiderable a sum, should we perplex ourselves with difficulties in so large a transaction? It could, at most, in common with all the items we have been examining, have furnished only a ground for a deduction, certainly not for dismissing the bill. Nor should we have proceeded to examine these items in detail, were it not that the court below will have to make a decree upon which it will be necessary to allow or disallow these items. Nor, when it is considered under what circumstances this second contract was entered into, would this court, upon slight grounds, be induced to open it.

§ 463. *A contract avowedly usurious, which is reformed and all the usurious items eliminated, is not tainted in its new form by the usury in its previous form.*

The parties had previously entered into a contract avowedly usurious with relation to the interest reserved. The defendant intimates his intention to avail himself of the defense of usury, and the parties sit down together for the sole and express purpose of purging it of all usurious taint, and to arrange a new contract respecting the same loan which should be legally obligatory.

Is it, then, probable that any deduction would have been withheld, which, by being retained, could affect the new contract with usury or with any of the incidents of usury? Would De Wolf have trusted himself again in the hands of Prentiss by mixing up anything with this contract on which a legal exception could be sustained? We think not.

But one of the counsel for the appellees has placed the objection to the complainant's right to relief on a more general ground than the receipt of usury or the avoidance of the contract under statute. He insists that it is enough for this court to refuse its aid that the contract of 1815 was prohibited by law, although not avoided by law.

§ 464. *While courts of equity will not aid in enforcing illegal or unconscionable contracts, they will not add to the penalties prescribed by the law.*

That a court of equity will not lend its aid to an illegal or unconscionable bargain is true. But the argument carries this principle rather too far as applied to this case. The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent., and so far no court would lend its aid to recover such interest. But the law goes no further; it does not forbid the contract of loan, nor preclude the recovery of the principal under any

circumstances. The sanctions of that law are the loss of the interest and a penalty to the amount of the whole interest and one-third of the principal, if sued for within a year. On what principle could this court add another to the penalties declared by the law itself?

§ 465. *If a contract be usurious, a subsequent agreement to free it from that taint will make it good.*

But the case does not rest here. The subsequent legal contract of 1817 rescued the case from the frowns of the law. Courts of justice will not shut the door in the face of the penitent; and hence it has been decided in a case very analogous to the present, that although a contract be in its inception usurious, a subsequent agreement to free it from the illegal incident shall make it good. 1 Campb., 165, note; 2 Taunt., 184.

According to the views, then, which we have exhibited of the case, the principal sum of the loan of 1815 was a subsisting debt at the date of the contract of 1817, and unaffected by any of the deductions contended for in the several items which we have considered. There was, then, a good consideration for the contract of 1817, and it is legally valid to the amount which it purports on the face of it. But if it were otherwise, there are two views of this subject upon which the court below ought to have sustained the bill.

It is very clear that the contract must be considered as a new and substantive contract. It is governed by a distinct code of laws from the Rhode Island contract and cannot be affected by the taint of usury which might have been transmitted to it under some circumstances, had it taken place in Rhode Island. It was, then, equivalent to a payment and re-loan; and no one can doubt that money paid on a usurious contract is not recoverable back beyond the amount of the usury paid.

§ 466. *The assignee of an equity of redemption cannot take advantage of usury between the mortgagor and mortgagee.*

Again, it is perfectly established that the plea of usury, at least as far as to landed security, is personal and peculiar; and however a third person, having an interest in the land, may be affected incidentally by a usurious contract, he cannot take advantage of the usury. Some exceptions may exist to this rule under bankrupt systems, but they are statutory and peculiar. Here, then, the case presents a third person, the assignee of an equity of redemption, setting up a defense, which, in one aspect, Prentiss himself cannot set up; and which, in another aspect, he has not set up; but, on the contrary, under the state of the pleadings, must be supposed to have refused to set up, or have abandoned. These views are independent of the effect of notice, or of the peculiar circumstances of the notice in this case.

§ 467. *The purchaser of an equity of redemption cannot complain of want of notice of the mortgage prior to his purchase. It is sufficient that he had such notice at the time of his purchase.*

It is true the Johnsons deny the notice prior to the deed of trust. But previous notice is immaterial, since the notice with which the law affects them is that which the deed to Barry, under which they claim, communicates to him as assignee. In the actual case the notice is peculiarly strong and pointed, since the only description of the lands in question, in the deed to Barry, is contained in a reference for description to the mortgage to De Wolf, and the purpose is explicitly declared to give priority to that mortgage. Technically and morally, therefore, they required no more than what should remain after satisfying De Wolf. But had they purchased from Prentiss, in the most

absolute and general manner; and altogether without notice actual or constructive, they still could have acquired no more than the equity of redemption, and that would not have transferred to them the right of availing themselves of the plea of usury. We have examined the cases quoted to this point, and are satisfied with their application and correctness. It would, indeed, be astonishing were it otherwise, for the contrary rule would hold out no relief to the borrower; it would be only transferring his money from the pocket of the lender to the pocket of the holder of the equity of redemption.

Upon the whole we are of opinion that the decree must be reversed, and the cause sent back to have a decree of foreclosure entered and carried into effect, according to the exigencies of the case.

§ 468. In general.—To constitute usury there must be a loan of money and a corrupt agreement to evade the statute by securing more than the legal rate of interest. Under whatever pretense or device this may be done, whatever shape the contract may assume, if the object is to evade the statute it is usury, and the jury must determine from the facts and circumstances as to the intent of the parties. *Judy v. Gerard*, \* 4 McL., 360.

§ 469. A. mortgaged certain property to B. to secure \$3,000. No rate of interest was specified, but A. took a lease of the premises at an annual rent of \$270. *Held*, that the agreement was a cover for a usurious rate of interest, and that the lease was void, and, the mortgagee having gone into possession, only the legal rate of interest could be recovered. *Gordon v. Hobart*, 2 Story, 243.

§ 470. An agreement to pay interest on a note at the legal rate and give a new note for the same amount payable in ninety days at a bank in another place will not be held usurious in the absence of proof that bills at ninety days on the place where it was payable commanded a premium, though it appeared that sight drafts did. *York Bank v. Asbury*, 1 Biss., 230.

§ 471. Usury is not to be favored; but the rule is well settled that when the contract on its face is for legal interest only, then, in order to render it usurious, it must be proved that there was some corrupt agreement, device or shift to cover usury, and that it was in full contemplation of the parties. *Hotel Co. v. Wade*, 7 Otto, 13.

§ 472. Miss James and Miss Dermott were principals in a bond due P. for a debt due by Miss Dermott alone. Negotiations were had between the latter and one Alexander to obtain money to pay off this obligation. Miss James gave her note to Miss Dermott to be used for this purpose, and the latter agreed, under seal with the former, binding herself to pay the note and the interest thereon as it fell due. This note was assigned to Alexander by Miss Dermott, and he agreed to discharge and did discharge the bond due P. Alexander was secured by mortgage upon the property of Miss James, and the matter was so arranged that he received twelve per cent. interest, which was usury under the local law. Miss James and her executors after her death having been compelled to pay the note assigned to Alexander, the executors brought suit against Miss Dermott upon her undertaking to pay this note, and the defense of usury in the loan by Alexander was interposed. It was held that the usury in the contract between Alexander and the defendant did not *per se* make void the bond assigned to Alexander and the covenant sued on; that if the testatrix had no knowledge of the usury in the agreement between defendant and Alexander, the bond which she gave to the defendant, although without consideration, was not usurious; that if the contract between Alexander and the defendant embraced no other parties than themselves, it could affect no contract between other parties previously made; that whether such contract was usurious depended on the intention of the parties to it, that is, whether *bona fide* for the purchase and sale of the bond, or as a mere cover for the purpose of evading the statute of usury in making a loan; that to involve the testatrix of the plaintiffs in the usury, and to extend its taint to the bond as well as to its assignment, it must be shown by proof that she executed the bond for the purpose of aiding the defendant to borrow money at a usurious interest, and not to enable her to raise money by selling it in the market; and that the defendant was bound to give notice to the plaintiff of her intention to plead the statute against usury in bar of the debt due Alexander. *Moncure v. Dermott*, \* 13 Pet., 845.

§ 473. Discount.—A *bona fide* purchase of a note or bond at a discount exceeding the legal rate of interest is not usurious, even if the note was given by its maker to the person selling it for the purpose of raising money on it, if the purchaser had no knowledge of this at the time. *Moncure v. Dermott*, \* 5 Cr. C. C., 446.

§ 474. A. made a note for the accommodation of B., and B. negotiated it at a usurious rate of discount. Upon presentation of the note against the estate of A. in bankruptcy, the defense

of usury was made. It was held that the assignee in bankruptcy of A. was not estopped from making this defense, because he had made proof of the claim against the estate of B., which was also in bankruptcy. *In re Dodge*,\* 9 Ben., 480.

§ 475. *Exchange*.—The defendants in Alabama owed the plaintiffs in New York a debt payable in Alabama. An adjustment took place in New York, by which a bill of exchange, payable in Alabama, was given for the amount then due, together with ten per cent. interest on the sum as exchange between the two places. It was decided that, as the instrument upon its face did not profess to charge any interest for forbearance, whether the item of exchange was intended as a cover for usury was a question exclusively for the jury, and that evidence on both sides was admissible to show the actual rate of exchange between the two places when the bill was drawn. *Andrews v. Pond*, 13 Pet., 65 (§§ 818-27).

§ 476. A purchase of a bill at any price is not usurious. If the rate of exchange charged be only colorable, it is usury. *McLean v. The Lafayette Bank*, 3 McL., 587.

§ 477. *Commissions*.—Pork packers in Illinois entered into an agreement with commission merchants in Maryland by which the latter were to advance the former, as it was needed, the sum of \$100,000, which they were to invest in the hog product at the rate of eighty per cent. of the money so advanced and twenty per cent. put into the purchase by the pork packers. The commission merchants were to have interest on the money advanced at the rate of ten per cent. per annum. The product was to be shipped to them for sale, and they were to have two and a half per cent. commission on the amount if sold within sixty days, and one per cent. commission for every thirty days it was carried thereafter. The contract gave to the pork packers the right to sell for themselves, without sending to the commission men, but the latter were to have their commissions in such case. It was decided, even as to these latter commissions, that the transaction was not necessarily usurious, but that it was for the jury to say whether under all the circumstances it was a device to cover usurious interest. *Cockle v. Flack*,\* 3 Otto, 344.

§ 478. B. applied to procure a loan. E. agreed to loan the amount, but nothing was said by him to the effect that S., who passed between the borrower and lender, was to be paid commissions as a condition of the loan. At the time of the consummation of the loan the question of commissions was raised between S. and B., and the latter finally paid them, not claiming that E. was under any obligation to pay them. And this was no part of the contract between the lender and borrower. *Held*, that this transaction could not be considered as a device to evade the usury laws, which is the test of usury in all such cases. *Eddy v. Badger*,\* 8 Biss., 238.

§ 479. A stipulation in a contract for the payment of nine per cent. interest on advances, where the legal rate was six per cent., was not necessarily usurious where it appeared that the extra three per cent. was intended as a compensation for certain services not otherwise provided for, though it might be so, depending on the agreement and intention of the parties. In such a case the question of usury would be one of fact. *Bridges v. Sheldon*, 18 Blatch., 507.

§ 480. *Indorsement of note to secure usurious loan*.—The holder of a note indorsed it as collateral to secure a usurious loan, and the indorsee brought suit against the maker thereon. Just before the trial an adjustment took place between the indorsee and indorser by which it was transferred to a third person, and the cause proceeded with by the plaintiff as trustee to his use according to the local practice. *Held*, that this was a device to rescue the interest of the plaintiff from the effects of the usury, and no attention would be paid to it. *Gaither v. Farmers' and Mechanics' Bank of Georgetown*,\* 1 Pet., 37.

§ 481. *Sale of rent charge*.—Deeds in terms providing for the sale of a rent charge of \$1,000 per annum in consideration of the sum of \$12,500 paid down, where more than six per cent. makes a contract usurious, do not create a usurious transaction when not accompanied by any mutual contract or understanding in any form, oral or written, that the amount of \$12,500 paid for the rent charge is to be treated as a loan at an annual interest of \$1,000, and when the deeds themselves do not contain any clause or provision or make any omission by virtue of which, under the laws of the country, a return of the money originally paid can be secured. A clause in the deeds providing that if the rent shall be in arrear for five years the grantor shall have the power of re-entry and to hold in absolute fee does not change the transaction into a loan, since a court of equity in relieving against the forfeiture would not decree a return of the purchase money paid for the ground rent. *Gordon v. Dooley*,\* 3 Hughes, 182.

§ 482. Under the code of Virginia of 1860, chapter 141, section 5, providing that "all assurances made directly or indirectly for the loan of money at a greater rate than six per cent." shall be void, any transaction which is in legal effect a usurious loan is void though it is in the form of a sale. *Ibid*.

§ 483. The statute of Indiana providing that "the rate of interest upon the loan or for the forbearance of any money . . . shall be at the rate of six per cent.," but "if a greater rate of interest shall be contracted for, received or reserved the contract shall not therefore be

void; "the plaintiff shall recover only his principal without interest." does not change the common law definition of usury, but aims to include the common devices resorted to by usurers to evade its penalties. *Hogg v. Ruffner*, \* 1 Black, 115.

§ 484. *Sale or loan.*—In deciding upon the question of usury, whether a negotiation of bonds is a sale or a loan is ordinarily a question of fact. To make it a question of law some fact must be admitted or proved which is irreconcilable with one conclusion or the other. The fact that the bonds are the obligations of the company negotiating them is not irreconcilable with the conclusion that the transaction is a sale, where the company is expressly authorized by law to do this; nor is the exaction of collateral security for the payment of the bonds a fact irreconcilable with such a conclusion. *Railroad Company v. Bank of Ashland*, \* 12 Wall., 226.

§ 485. *Depreciated bank bills.*—There was an agreement to purchase \$1,000 in notes of the Bank of Illinois, for which a note for \$1,000 was given, to be discharged on the payment of \$500. By subsequent agreement this note was surrendered and one for \$750 given. It was alleged that notes of this bank were not worth more than thirty-seven cents on the dollar, and that the contract was usurious. It was held that if the purchase was *bona fide* the transaction was not usurious, notwithstanding the reduced value of the notes, but otherwise if the intent was to evade the statute and obtain a loan for more than the legal rate of interest. *Judy v. Gerard*, \* 4 McL., 360.

§ 486. *A bill of exchange which is really the paper of the payees by whom it is indorsed, no consideration passing between the payees and the maker, is tainted with usury in its inception, if indorsed by the payees in execution of a usurious agreement.* *Andrews v. Pond*, 13 Pet., 65 (§§ 318-27).

§ 487. *As to time of receipt of excess—Gift.*—Under an act providing that "no person shall directly or indirectly receive any greater sum or value for the loan or use of money than in this act prescribed," it is held that it is not necessary that the "greater sum or value" should be received or contracted for at the time of making the loan. If it is received at any time, for or on account of such loan, it is within the prohibition of the act. The borrower may, of course, make a gift to the lender over and above the lawful interest; but whether such money passes as a gift or in consideration for the loan, in pursuance of an understanding of the parties, is a question of fact in each particular case, with a reasonable inference, in the absence of anything to the contrary, that it was received in consideration of the loan. Where the lender went to the borrower and asked him if he wanted some money, and the latter replied that he did, whereupon the former counted out \$370 and received a note for the amount, with interest, and while the money was lying there the lender asked the borrower how much he was going to allow him for the accommodation, and \$20 was handed back, it was held that this \$20 was interest and not a gift. *In re Pittcock*, 2 Saw., 417 (§§ 540-43).

### III. LAW OF THE PLACE.

**SUMMARY**—*Law of the place of performance*, §§ 488, 490.—*Mortgage in one state to secure a note payable in another*, § 489.—*Note drawn in one state and discounted in another*, § 491.—*As to the penalty*, § 492.

§ 488. Contracts are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher rate without incurring the penalties of usury. The converse of this is also true. If the rate of interest allowed at the place of the contract be higher than that allowed at the place of performance, the parties may lawfully contract in that case also for the higher rate. These rules are subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. *Miller v. Tiffany*, §§ 493-94.

§ 489. A resident of Michigan mortgaged his land, situated in that state, to secure a note made payable in New York, which note was void for usury under the laws of New York but valid under the laws of Michigan. Upon a suit to foreclose the mortgage, brought in Michigan, it was decided that the action could be maintained, there being nothing to show that the transaction was not perfectly fair or that usury under the New York statute was intended. *Fitch v. Remer*, §§ 495-99.

§ 490. Where a note is made at a place where the law provides one rate of interest, and is payable at a place where the law provides a different rate, the place of payment is to govern as to what the rate of interest shall be. *Heath v. Griswold*, §§ 500-503.

§ 491. Where a note was signed and indorsed for accommodation in New York, and sent by the maker to Massachusetts, and there discounted at a rate of interest usurious under the



laws of both states, and the proceeds sent to the accommodation indorser in New York and there used by him for the maker, in an action against the accommodation indorser upon the note, it was held that the law of Massachusetts and not that of New York governed as to the penalties to be inflicted for the usury. *Ibid.*

§ 492. A statute providing as a penalty for usury that the defendant shall recover his costs in an action upon a usurious contract relates to the forum and cannot apply in a suit in a state other than the one enacting the statute. *Ibid.*

[NOTES.—See §§ 504-517.]

### MILLER v. TIFFANY.

(1 Wallace, 298-311. 1863.)

APPEAL from U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—Bill in the United States circuit court for Indiana to foreclose a mortgage given to secure a note executed by Miller, of Fort Wayne, Indiana, to Palmer and Wallace, and by them assigned to Tiffany. The note was for \$20,000, given on the purchase of a stock of goods, payable in five years from date, at Cleveland, Ohio, and drew ten per cent. interest, payable semi-annually, with the current rate of exchange on New York. The mortgage covered certain real estate belonging to Miller, and located in Indiana.

Opinion by MR. JUSTICE SWAYNE.

Two defenses to the mortgage are relied upon: 1. That the goods sold to the defendant, which formed the consideration of the note secured by the mortgage, were worth largely less than the amount for which the note was given. It is claimed, therefore, that there has been a partial failure of consideration.

The evidence upon the subject is conflicting. It has failed to establish to our satisfaction the fact alleged. Fraud or misrepresentation by the vendor is neither averred nor proved. It is in proof that the goods were carefully examined by the agents of Miller before they were bought, and that they were selected when the purchase was made. They were sold at the regular prices of the establishment. It does not appear that Miller made any objection, either to the prices or quality, when he received them; or that he ever made any objection until it was set up in his answer in this case, more than a year after the goods were delivered to him.

§ 493. *A warranty of goods is not implied from full price.*

The objection comes too late. The sanctity of contracts cannot thus be trifled with. The common law, unlike the civil law, does not imply a warranty from a full price. Where there is neither fraud nor warranty, and the buyer receives and retains the goods, without objection, he waives the right to object afterwards, and is finally concluded. In such cases the rule of *caveat emptor* applies. *Hargous v. Stone*, 1 Seld., 73.

§ 494. *Parties may contract for the rate of interest allowed either by the place of the contract or the place of performance.*

2. The defense chiefly relied upon is usury. The result of our inquiry upon that subject must depend upon the *lex loci* that governs the contract. Palmer and Wallace, the payees of the note, were the signees of an insolvent firm, which did business under one name in New York, and under another at Cleveland, Ohio. Palmer resided at New York and Wallace at Cleveland. About \$50,000 worth of the goods, covered by the assignment, were at the former city, and about \$75,000 worth at the latter. The negotiation for the sale was commenced by Palmer and concluded by Wallace. Miller lived in Indiana. The note and mortgage were executed in that state. The mortgaged premises

are situated there. Wallace was present at the execution of the securities. They were transmitted to Palmer, at New York, and the goods were thereupon shipped thence to Indiana. The note and mortgage have been assigned to the appellee.

We lay out of view the imputation upon Palmer and Wallace of a fraudulent purpose to evade by shift or device the usury statute of Indiana or New York. It is wholly unsupported by the evidence. They were acting in a fiduciary character, and could have had no motive to engage in such a transaction. There is no reason to believe that such a conception entered into their minds. On the other hand, we are by no means satisfied that it was not the deliberate purpose of Miller, when the arrangement was made, to involve them in the toils of this defense, and if possible to escape with the goods without paying anything for them. Our business, however, is to ascertain and apply the law of the case. We shall not discuss the evidence bearing upon the ethics of his conduct.

"The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury." *Andrews v. Pond*, 13 Pet., 77, 78 (§§ 318-27, *supra*); *Curtis v. Leavitt*, 15 N. Y., 92; *Berrien v. Wright*, 26 Barb., 213. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate. *Depeau v. Humphrey*, 20 How., 1; *Chapman v. Robinson*, 6 Paige, 634.

The rules are subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there, it is so everywhere. *Andrews v. Pond*, 13 Pet., 78; *Mix v. The Madison Ins. Co.*, 11 Ind., 117; *Corcoran v. Powers*, 6 Ohio St., 19.

When these securities were executed the statute of Ohio of the 14th of March, 1850, upon the subject of interest was in force. According to its provisions parties might lawfully contract for any rate of interest not exceeding ten per cent. per annum. The contract of Miller was therefore valid.

*Decree affirmed, with costs.*

#### FITCH v. REMER.

(Circuit Court for Michigan: 1 Bissell, 837-845; 1 Flippin, 15. 1860.)

Opinion by McLEAN, J.

STATEMENT OF FACTS.—This bill was filed to foreclose a mortgage. When the mortgage was executed Fitch resided in New York, the defendants in the state of Michigan. On the 1st of January, 1850, the complainant loaned to the defendants \$2,000, to secure which the defendants executed a bond and mortgage on land in Michigan. The sum loaned was to be paid in January, 1856, to the complainant, at his residence in the state of New York, with interest at ten per cent. per annum, payable semi-annually. In New York the legal interest is seven per cent. per annum, and any per cent. above that sum

is usurious, and the instrument is declared to be void. In Michigan there is no penalty for usury, the excess over the legal rate, only, being recoverable.

It is agreed that this proceeding to enforce these securities must be under the laws of New York or the laws of Michigan, whichever shall be held to be the law of the contract. This is the only question in the case, there being no dispute about the facts.

§ 495. *A contract in respect to its construction and force is to be governed by the law of the country or state in which it is executed. Exceptions to the rule.*

The general rule is, that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed. 2 Kent's Commentaries, 459; Story's Conflict of Laws, § 242. In *Reimsdyk v. Kane*, 1 Gall., 374 (EQUIVY, §§ 919-29), Judge Story says the rule is well settled "that the law of the place where a contract is made is to govern as to the nature, validity and construction of such contract," unless it shall appear from the tenor of such contract it was entered into with a view to the laws of some other state; as where a negotiable note was indorsed in a state different from that in which it was made. *Slacum v. Pomery*, 6 Cranch, 221. Lord Mansfield, in *Robinson v. Bland*, 2 Burr., 1077, says: "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country." And Kent, Ch. J., in 1 Johnson, 92, said, "The force and effect of the contract must be determined from the contract itself, and not by proof *aliunde*."

Huberus, in his *De Conflictu Legum*, volume 2, book 1, title 3, says, "The general rule is that contracts are to be interpreted according to the laws of the country where they are made; but if, from the terms or nature of the contract, it appears it was to be executed in a foreign country, or that the parties had respect to the laws of another country, then the place of making the contract becomes immaterial, and the obligation must be tested by the laws of the country where the duty was to be performed." In *Champant v. Ranelagh*, Prec. in Ch., 128, it was decided that a bond executed in England, and made payable in Ireland, carries Irish interest, where no interest was mentioned. *Fanning v. Consequa*, 19 Johns., 511. In *Robinson v. Bland*, 2 Burr., 1077, a bill of exchange drawn in France for money lent there, and made payable in England, was deemed a contract subject to the laws of England, and to bear English interest. In *Thompson v. Ketcham*, 4 Johns., 285, a note was drawn in Jamaica, made payable in New York, and the supreme court of New York followed the same rule. In *Smith v. Smith*, 2 Johns., 235; *Ruggles v. Keeler*, 3 Johns., 263, and *Van Schaick v. Edwards*, 2 Johns. Cases, 355, the same doctrine was carried out.

§ 496. *If a contract is entered into in one state to be performed in another, the laws of the latter place govern its force and effect.*

A contract is to be construed by the law under which it was made, but if entered into to be performed in another state or place, it is to be treated, generally, as to its force and effect, by the laws of the latter place; and it will be good or bad according to the laws of such place. To this there is an exception in regard to official bonds, taken in pursuance of an act of congress, which are not subject to the local law, but are assumed to have been executed at the seat of the federal government. *Cox v. United States*, 6 Pet., 173 (BONDS, §§ 401-4); *Andrews v. Pond*, 13 Pet., 77 (§§ 318-27, *supra*); *Bell v. Bruen*, 1 How., 169 (CONTRACTS, §§ 282-86); *Brabston v. Gibson*, 9 How., 263 (BILLS AND NOTES, §§ 438-40); *Fanning v. Consequa*, 17 Johns., 511; *Ruggles v. Keeler*, 3

Johns., 263; *Thompson v. Ketcham*, 4 Johns., 285; *Barney v. Newcomb*, 9 Cush., 46; *Story on Conflict of Laws*, § 280; *Story on Bills*, § 147; *Robinson v. Bland*, 2 Burr., 1077.

Under the principles laid down in the above authorities, it is insisted that the instrument before us is a New York contract, and that the agreement to pay more than seven per cent. interest is usurious and void; and as the contract binds the defendant to pay the complainant, in New York, interest at the rate of ten per cent. per annum, semi-annually, and the loan at the end of six years, the argument is presented with great force against the legal rights of the complainant; and this contract, it is urged, is to be governed by the law of the place of performance, and whatever shall be a good defense there shall be good everywhere. This doctrine is laid down in *Story on Conflict of Laws*, sections 331, 305, and *Story on Bills of Exchange*, section 161. And it is admitted that where a contract is made in one place, payable in another, without fixing the rate of interest, such rate is determined generally by the laws of the latter place. *Scofield v. Day*, 20 Johns., 102; *De Wolf v. Johnson*, 10 Wheat., 367 (§§ 460-67, *supra*); *Healy v. Gorman*, 3 Green, 328.

And it is admitted by the highest authority that any interest may be lawfully stipulated for, not exceeding the law of the place where the instrument is payable. *Andrews v. Pond*, 13 Pet., 77 (§§ 318-27, *supra*); *Thompson v. Ketcham*, 4 Johns., 285; *Robb v. Halsey*, 11 Smedes & M., 140.

These concentrated authorities seem to cover the whole ground of controversy, leaving but little for doubt or speculation. Principles are sometimes evolved from the exigencies of society, and grow into favor from their adaptation to the fitness of things. No one can say that both the common and civil law have not been ameliorated and improved by such means. But we are to look to established principles and not to theories in considering the case before us.

The debt is founded upon a bond and mortgage for the payment of \$2,000, executed on land in Michigan, by the defendant to the complainant, a citizen of New York, payable in six years at the rate of ten per cent. per annum semi-annually, on the 1st days of July and January, to the complainant, at his residence in New York.

§ 497. *The law of the place where the contract is made determines the rate of interest, when a specific rate of interest is mentioned in the contract.*

In 2 Kent's Commentaries, 460, it is said: "If, however, the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though that rate be higher than is lawful by the law of the place where payment was to be made, the specified rate of interest at the place of the contract has been allowed by the courts of justice in that place; for that is part of the substance of the contract. The general doctrine is that the law of the place where the contract is made is to determine the rate of interest when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case the rate of interest of the place of payment is to govern." *De Wolf v. Johnson*, 10 Wheat., 367 (§§ 460-67, *supra*); *Quince v. Callander*, 1 Desaus., 160.

"With respect to the question of usury, in order to hold the contract to be usurious it must appear that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the pay-

ment was not to be made abroad; for if it was to be made abroad, it would not be usurious." *Thompson v. Powles*, 2 Simon, 211.

§ 498. — *authorities cited and commented upon.*

In reference to the above cited case, Chancellor Kent says, volume 2 of his Commentaries, 461: "According to the case of *Thompson v. Powles*, it is now the received doctrine at Westminster Hall, that the rate of interest on loans is to be governed by the law of the place where the money was to be used or paid, or to which the loan has reference; and that a contract made in London to pay in America, at a rate of interest exceeding the lawful interest in England, was not a usurious contract, for the stipulated interest was parcel of the contract." This appears to be a liberal relaxation of the rigor of the former rule in the English courts, and it is conformable to the American cases. Story's *Conflict of Laws*, § 305.

In the somewhat noted case of *Depau v. Humphreys*, 20 Martin, 1, the note was given in New Orleans, payable in New York, for a large sum of money bearing an interest of ten per cent., being the legal interest in Louisiana, the New York legal interest being seven per cent. only. The question was, whether the note was tainted with usury, as it would be if made in New York. The supreme court of Louisiana decided that it was not usurious; and that although the note was made payable at New York, yet the interest might be stipulated for, either according to the law of Louisiana or according to that of New York. To the same import are the cases of *Peck v. Mayo*, 14 Vt., 33; and *Chapman v. Robertson*, 6 Paige, 627. In *Pratt v. Adams*, 7 Paige, 615, the court says, "if the contract was not illegal by the laws of the country where it was made and where the money was loaned, the fact that the drafts were payable in New York would not render them void under our usury laws, except in a case where the loan of the money out of this state was a mere device to evade the operation of the law of this state which was intended as a cover for usury." The doctrine is well established, if a mortgage be executed in Michigan, which is the domicile of the mortgagor at the legal rate of interest, full effect will be given to the security without reference to the usury laws of any other state which neither party intended to violate. In *Andrews v. Pond*, 13 Pet., 78 (§§ 318–27, *supra*), the court says, "the general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

By the statute of Michigan ten per cent. was the legal rate of interest, and this was the amount stipulated to be paid and constituted a part of the contract; the court cannot presume, therefore, against the fact, that usury under the New York statute was intended.

In *Ohio Ins. Co. v. Edmondson*, 5 La., 295, 299, 300, the court says, "by the comity of nations a practice has been adopted, by which courts of justice examine into and enforce contracts made in other states, and carry them into effect according to the laws of the place where the transaction took its rise. This practice has become so general in modern times, that it may be almost stated to be now a rule of international law, and it is subject only to the exception that the contract to which aid is required should not, either in itself or in the means used to give it effect, work an injury to the inhabitants of the

country where it is attempted to be enforced." Story's Conflict of Laws, § 244.

In *Chapman v. Robertson*, 6 Paige, 633, the court said, "I have arrived at the conclusion that this mortgage, executed here, and upon property in this state (New York), being valid by the *lex situs*, which is also the law of the domicile of the mortgagor, it is the duty of this court to give full effect to the security."

If no place of payment is prescribed, the contract takes effect as a contract of the place where it is made; and being payable generally, it is payable everywhere; and after a demand and refusal of payment, interest will be allowed according to the law of the place of the contract. But if the place of payment or of performance is different from that of the contract, then the interest may be validly contracted for at any rate not exceeding that which is allowed in the place of payment or performance.

"Whether a contract is usurious or not depends, not upon the rate of interest allowed, but upon the validity of that interest in the country where the contract is made and is to be executed. A contract made in England for advances to be made at Gibraltar, at a rate of interest beyond that of England, would, nevertheless, be valid in England; and so a contract to allow interest upon credits given in Gibraltar at such higher rate would be valid in favor of the English creditor." Story on Conflict of Laws, § 292.

In his Conflict of Laws, section 488, Mr. Justice Story says: "Boullenois has nowhere, to my knowledge, directly and positively treated the question whether the interest may be stipulated for according to the place of the contract when payment is to be made in another place where it would be illegal." In section 304a, he says, "if the transaction is *bona fide* and not with intent to evade the law against usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher rate of interest." No one ever doubted this. The daily experience of every business man shows that a note is legal, if given for a rate of interest fixed by law in any state where it is payable. In Michigan ten per cent. is the legal rate of interest, and may be recovered.

Mr. Justice Story objects to the principle here laid down, and there is no jurist in America or in England of higher authority. He admits, in section 299, that the phrase *lex loci contractus* may have a double meaning or aspect; and that it may indifferently indicate where the contract is actually made, or where it is virtually made, according to the intent of the parties, that is, the place of payment or performance. And he says, "we have seen that the rule of the civil law clearly indicates this."

No one can suppose that a contract can be distributed into parts, and so made good for the whole, but that the clear intention of the parties may be understood and applied; as where the legal rate of interest stipulated to be paid is higher where the contract is entered into than at the place of payment, the higher rate may be presumed to be within the intention of the parties.

§ 499. *Where the place of performance allows a higher rate of interest than the place of contract, such rate may be contracted for provided the transaction is bona fide and not intended as a mere cover for usury.*

If the transaction is *bona fide* and not with intent to evade the law against

usury, and the law of the place of performance allows a higher rate of interest than that permitted at the place of the contract, the parties may lawfully stipulate for the higher interest. But then the transaction must be *bona fide*, and not intended as a mere cover for usury. *Andrews v. Pond*, 13 Pet., 65 (§§ 318-27, *supra*). Mr. Chancellor Kent has correctly laid down the modern doctrine; and he is fully borne out by the authorities. "The law of the place," says he, "where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on land in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern." 2 Kent, 460; *De Wolf v. Johnson*, 10 Wheat., 367 (§§ 460-67, *supra*); *Schofield v. Day*, 20 Johns., 102; *Thompson v. Powles*, 2 Simon, 194.

It is agreed that the above loan was made in this manner: "An agent of the complainant, Mr. Loomis, residing in St. Clair county, drew a draft on the complainant, caused the same to be cashed at a bank in the city of Detroit, and paid the proceeds over to said Remer, at said St. Clair; the bond and mortgage were executed at St. Clair, on real estate in said county of St. Clair, and delivered to said Loomis, at that place, as the agent of complainant."

It is also agreed, that by the laws of the state of New York, in force at the time of making said loan, and ever since in force, the taking more than seven per centum per annum upon any loan of money was prohibited, and any contract or security made or taken in violation thereof was by such laws void.

Now, that this was a perfectly fair transaction, understood by the parties, no one can question. The contract was valid under the laws of Michigan, unaffected by any taint of usury. No deception was practiced. The contract can be legally enforced in Michigan; and this suit is now brought to enforce it. There is not a circumstance to show that the parties had in view any other rate of interest than that which was stipulated in the contract. And if that rate of interest cannot be recovered under the laws of New York, no one doubts that it may be recovered in the state of Michigan, where the contract was made. In *Andrews v. Pond*, 13 Pet., 78 (§§ 318-27, *supra*), the supreme court says: "If the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." And the court says, taking eight per cent. in Alabama is no violation of the New York law.

The bond and mortgage are valid under the Michigan law, and the complainant elects, as he has a right to do, that he will proceed under the Michigan statute. And it is difficult to perceive on what ground the defendant can complain that his rights are affected by the usury law of New York. The ten per cent. interest which the defendant agreed to pay was a part of the contract authorized by the laws of Michigan, and this contract is not supposed to be impaired by an agreement to pay the same rate of interest in New York. The mortgagee claims the ten per cent. interest under the Michigan law, and this he is entitled to.

## HEATH v. GRISWOLD.

(Circuit Court for Vermont: 18 Blatchford, 555-551. 1881.)

§ 500. *The power to try an action upon questions submitted by a referee, to whom the cause was referred, exists as incident to all courts in which trials of fact may be had.*

Opinion by WHEELER, J.

This cause was referred by consent of parties given by counsel in open court, and has now been heard upon questions submitted by the report of the referee. Some doubts have arisen as to whether the courts of the United States have power to try questions submitted by, and render judgments upon, such reports, as the statutes do not give the power in express terms. But it seems to be well settled that such power exists, as incident to all courts in which trials of fact may be had. *Newcomb v. Wood*, 97 U. S., 581; *Lumber Co. v. Buchtel*, 101 U. S., 633.

STATEMENT OF FACTS.—The action is *assumpsit* upon two promissory notes, indorsed, with others, by the defendant, for the accommodation of William H. Dickinson, both of New York, to William Dickinson, of Massachusetts, for whose benefit this suit is brought, in successive renewal of other notes upon which the defendant was accommodation indorser or surety for William H. Dickinson, all of which were dated and signed and indorsed at New York, and some of them made payable there, and sent to William Dickinson in Massachusetts, and discounted there by him, some at twelve per cent. interest, and the avails forwarded to the defendant and used for William H. Dickinson at New York. The notes were secured by corporation stock transferred by William H. Dickinson to William Dickinson, and by him to relatives to avoid liability as a stockholder, knowing that the defendant was a mere accommodation indorser or surety. Two principal questions arise upon these facts; one is, whether the law of New York, which forfeited notes for usury, or that of Massachusetts, which, at that time, forfeited three times the amount of unlawful interest, should govern; and the other is, as to what the effect of that disposition of the stock was upon the liability of the defendant.

§ 501. *The question whether the interest contracted for is usurious depends upon the law of the place of payment; but where the question is not which law is to govern in the execution of the contract, but which is to decide the fate of the security taken upon a usurious agreement, unquestionably it is the "lex loci contractus."*

Upon the first question it is apparent that the notes did not become operative until they were delivered to and accepted by William Dickinson, which was in Massachusetts. The contracts evidenced by them were made in that jurisdiction. The interest reserved upon the discount of the notes was taken there. As to what the rate of interest shall be, where a note is made at a place where the law provides one rate, and it is payable at another place where the law provides a different rate, and all other questions arising out of which law the parties are presumed to have intended to contract with respect to, there seems to be no fair question but what the law of the place of payment is to govern. The authorities cited for the defendant abundantly show this. But this is not the question here. There is no question about what these parties intended. They all intended that on so much of the paper William Dickinson should receive twelve per cent. interest, and contracted so that the defendant might become liable to pay it. This in New York would be



contrary to the law there, and would involve certain penal consequences; and in Massachusetts would involve other and different consequences. The law of neither state had any force in the other, or outside of its own territory. A wrong was done, in the eye of the law, by William Dickinson, in reserving this interest; the question is, in which jurisdiction did he commit the offense and by which law must it be redressed? He is not shown to have done anything in New York. All he did was done in Massachusetts. He closed the contract there; all he has received has been paid there. If the notes had been written with interest, merely, and the question had been whether this meant the Massachusetts rate of six per cent. or the New York rate of seven, there would have been no fair question but that, when the place of payment was in New York, the New York rate of seven was intended, and would have been lawful. But here there is no question about what was meant; it is about what was done, and what has been done has been done in Massachusetts. This distinction is clearly recognized in the authorities. In *Andrews v. Pond*, 13 Pet., 65 (§§ 318-27, *supra*), Chief Justice Taney said, with reference to this question: "The question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon a usurious agreement which neither will execute. Unquestionably it must be the law of the state where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last named cases, the agreements were permitted by the *lex loci contractus*, and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made." In *Tilden v. Blair*, 21 Wall., 241 (BILLS AND NOTES, §§ 389-90), the acceptance in controversy was executed in New York and made payable there, but was negotiated in Chicago at a rate exceeding that allowed by law at either place, but the consequences were different. It was held that the contract was made in Illinois and was to be governed by the law there. Those cases are sufficient to govern the ruling of this court in this case.

§ 502. *Penalty for usury in Massachusetts.*

As this was a Massachusetts contract, no reason is seen why so much of the law of that state as relates to the security itself should not be applied to it. That law was then (Gen. Stat. Mass., 1860, ch. 53, sec. 4), that "when, in an action brought on such contract or assurance, it appears that a greater rate of interest than is allowed by law has been directly or indirectly reserved, taken or received, the defendant shall recover his full costs, and the plaintiff shall forfeit threefold the amount of the interest unlawfully reserved or taken, and no more, and shall have judgment for the balance remaining due after deducting said threefold amount." Under this statute, when unlawful interest is reserved on a note, and the amount is carried by renewal into other notes, the threefold amount is to be deducted in an action upon the last note. *Upham v. Brimhall*, 11 Met., 526. So, in this action, threefold the amount of such unlawful interest as was brought forward into these notes is to be deducted, as of the dates when these sums were brought in. The amount is shown by the report to be the amount reserved on Nos. 1, 5, 8 and 9, on page 4, and might be readily computed, except that the length of time for which No. 9 was discounted does not appear. As the two notes in each suit are of the same date,

and alike, one-half the amount to be deducted should be applied to each. The recovery of costs by the defendant, under that statute, relates to the forum, and cannot apply here in a different forum.

§ 503. *What amounts to a conversion of stock placed in the hands of a party to serve as security for the payment of a note, etc.*

It is argued, that, as the corporation stock transferred to William Dickinson was a pledge for the security of the notes, a conversion of it to his own use would operate as a payment to the extent of its value at the time of conversion, and that the transfer of it was such a conversion, or, if not a conversion, such a misappropriation as would discharge the surety, at least to the same extent. If the effect of a conversion would be as claimed, there must be a real conversion first. What appears to have been done does not amount to that. He did not put it to his own use in any respect. He put it into other hands to hold for him, in order that what was intended for a security might not be a burden. The honesty of the purpose is not important in this aspect. The question is as to the amount of what was done, not the motive with which it was done. If it amounted to a conversion, good motives would not make it less; and, if not, bad ones would not make it more. He did not exercise any dominion over it in defiance of the rights of those for and from whom he held it, but only in furtherance of the object for which he took it. He did not sell it, but merely transferred it to be held for him, and took the certificates under his right, with a power of attorney to transfer it at his will again, which he held coupled with his interest.

The further question is, whether what he did so impaired the security as to affect the right of the surety. Under the circumstances, he was bound to so manage it that the surety should not in any substantial degree be deprived of its application to the debt. He was not at all responsible for the depreciation in its value. He is only to be affected by what would affect its title injuriously. Placing it in other hands would not have that effect unless it was so placed as to be beyond his and the surety's reach and control. The power of the attorney would keep it within his control, unless it was revocable against his will. Had it been their property it would be, but coupled with his interest it would not be. *Hunt v. Rousmanier*, 8 Wheat., 174; *Story on Agency*, § 477. Still, it is argued that the title had been put out of his hands, for an illegal purpose, and that no court would enable him to regain it, and that so the right to it was affected injuriously to the surety. It is said that the conveyance was made to avoid a liability or duty. This is not quite correct so far as the report goes. The report does not show that there was, in reality, any liability whatever resting upon the stockholders of that corporation. It says that he was unacquainted with the company and knew nothing of the legality of its organization, and was unwilling to incur liability as a stockholder. His fear may have been wholly vain. Without some liability, to be avoided there could be no real fraud in undertaking to avoid it. And, if there had been, it would not have affected those to whom he had made transfer, and, probably, not their obligation to convey at his request. Those entitled to the duty might have held him to it, but that would not change the condition of this surety. He does not appear to have lost control of the property to the detriment of the surety in any way.

Judgment is ordered, on the report, for the plaintiff, for the amount of the notes, after deducting the threefold interest applicable, which, on amendment of the report, is found to be \$28,895.40.

§ 504. In general.—As to interest and usury a contract is governed by the law of the place where it is made, although secured by the conveyance of land in another state. *De Wolf v. Johnson*, 10 Wheat., 367 (§§ 460-67).

§ 505. Where a loan was made in Rhode Island and secured by conveyances of real estate in Kentucky, and a new contract made in Kentucky was subsequently substituted, it was held that this latter must be governed by the usury law of Kentucky, and not that of Rhode Island. *Ibid.*

§ 506. A citizen of one state may loan money to a citizen of another state, and contract for the rate of interest allowed by the law of the latter, although the place of payment is elsewhere. So where a citizen of New York loaned money to a citizen of Nebraska at a rate of interest allowed by the laws of that state, but forbidden by the laws of New York, which loan was secured by mortgage on Nebraska lands, and payment was made in New York, it was held that the contract was to be governed by the laws of Nebraska and was valid. *Kellogg v. Miller*, 2 McC., 395.

§ 507. If a contract is made in one place and is to be performed in another, it is to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher rate without incurring the penalties of usury. *Andrews v. Pond*, 13 Pet., 78 (§§ 318-27).

§ 508. Whether a creditor may prove a usurious claim in bankruptcy depends on the local law upon the subject of usury. *In re Pittock*, 2 Saw., 416 (§§ 540-43).

§ 509. Where money was loaned by persons living in Maryland to persons living in Illinois, it was decided that it was as much an Illinois contract as a Maryland one, and that as Illinois was the forum the question of usury was to be determined by its laws. *Cockle v. Flack*,\* 3 Otto, 344.

§ 510. Whether a contract is usurious is determined by the law of the place where the money is payable, although the parties may stipulate in accordance with the law of the place where the contract is made. The place of payment must not, however, be adopted as a shift or device to avoid the statute of usury. *Railroad Company v. Bank of Ashland*,\* 13 Wall., 226.

§ 511. A contract for a loan of money at a rate of interest which is legal in the state where the contract is made and where the loan is to be advanced, though the money is to be repaid in a state where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the state where the money is to be repaid. *Second National Bank v. Smoot*,\* 2 MacArth., 371.

§ 512. Bills and notes.—Where notes were drawn in Philadelphia for the accommodation of C., a resident of Philadelphia, who indorsed them and had them discounted in New York at a usurious rate of interest, receiving the proceeds in checks on a New York bank, *held*, that the transaction was governed by the laws of New York, and as the notes became void for usury under the laws of New York, C. was not liable as indorser. *In re Conrad*,\* 1 Leg. Gaz. R., 284.

§ 513. Where notes were issued in Vermont by a railway company pursuant to a vote of the stockholders and under the authority of a statute of Vermont, but were payable in Massachusetts, *held*, that the question of usury was to be decided by the laws of Vermont. *Codman v. Vermont, etc., R. Co.*, 16 Blatch., 165.

§ 514. Where a note is made in one state and dated in another, and is payable at a bank in the latter state, and is sent there and discounted, it is governed, so far as the laws of usury are concerned, by the statutes of the latter state. *Second National Bank v. Smoot*,\* 2 MacArth., 371.

§ 515. Where a note is made and signed in New York, and transmitted by its maker to Rhode Island to be there discounted, and is so discounted, it has its inception as an obligation in the latter state, and the law of Rhode Island and not that of New York governs upon the question of usury. It was so held where the suit was brought in the United States circuit court in New York. *Providence County Savings Bank v. Frost*,\* 14 Blatch., 233; 8 Ben., 234.

§ 516. Defendants in Alabama owed the plaintiffs in New York a debt payable at the former place. A settlement took place in New York, in which a bill of exchange was given, payable in Alabama, for the amount then due, together with ten per cent. thereon as the difference of exchange between the two places. It was claimed on the part of the defendants that usury was covered by this exchange. If this was so, the amount was such that the contract was usurious by the law of both states, but the penalties in each were different. *Held*, that the agreement must be governed by the law of the place where it was made and the instrument taken to secure its performance, such a contract not standing upon the same principles as a contract which is valid where made. *Andrews v. Pond*, 13 Pet., 65 (§§ 318-27).

§ 517. A note was made in New York for the accommodation of a firm there, and by the latter indorsed to a certain note broker in New York to be disposed of for their benefit. The broker, by an offer contained in a letter, sold it to persons in Connecticut, who in payment therefor transmitted a check upon a New York bank. This sale was at a usurious rate of discount under the laws of New York. Upon presentation of the note for allowance against the estate of the maker in bankruptcy, it was held that the Connecticut persons were the first holders for value; that the transaction was to be governed by the law of New York, and that the note was usurious and void. *In re Dodge*,\* 9 Ben., 480.

#### IV. ASSIGNEES AND INDORSEES.

SUMMARY — *Innocent purchasers*, §§ 518-520. — *Usurious negotiation of a valid instrument*, § 521. — *Lex loci*, § 522. — *Suit by indorsee*; *usurious discount*, § 523.

§ 518. Where a usurious obligation passes for value into the hands of an innocent purchaser without notice of the usury, and where the innocent assignee takes a new and substituted security for the debt, there being no taint of usury in the second transaction, the plea of usury to the substituted obligation cannot be sustained. Especially is this so where the obligation is founded upon additional considerations, as the extension of time and the advance of a further sum of money. So long as the usurious contract remains in the hands of the original party to it, no change in the form of the security will have any effect to purge it of the taint of usury, but where it has passed into the hands of an innocent assignee the rule is different. *Palmer v. Call*, §§ 524-26.

§ 519. Section 2081 of the code of Iowa provides that nothing in the statute shall be construed "to prevent the proper assignee in good faith and without notice of any usurious contract, from recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money." It is held that this provision is merely intended to give the assignee without notice a remedy where he had none before; that is, where he stands upon the original usurious contract without any new security; that it is not applicable where the assignee without notice takes a new security, since he is fully protected without it; and that the legislature in using the term "assignee" and not "indorsee" did not mean to provide for innocent indorsees of mercantile paper who are already amply protected by the law merchant. *Ibid.*

§ 520. A statute which does not make a usurious contract void, but only voidable as to the excess of interest, does not make usurious negotiable paper void in the hands of an innocent holder for value without notice of the usury. *Ibid.*

§ 521. Where a valid instrument is created untainted with usury, a subsequent usurious negotiation of it cannot be pleaded by the drawer in discharge of his obligation. In such a case the question of usury is limited between the indorser and indorsee, and does not reach or taint the original instrument. But where a bill of exchange is drawn and indorsed by the drawer for the accommodation of the drawee and acceptor, the contract has its inception in the negotiation of the bill by the latter, and usury in this transaction avoids the instrument as against the accommodation drawer and acceptor. *Davis v. Clemson*, §§ 527-29.

§ 522. A bill of exchange was drawn and indorsed by the drawer in Ohio, on and for the accommodation of S., in New York, who accepted it in New York, and had it discounted there at a usurious rate of interest under the laws of that state, the persons discounting it having notice that it was drawn and indorsed for the accommodation of S. Held, that it was a New York contract, and that the law of New York avoided it not only as against the acceptor for whose benefit it was negotiated, but also as against the accommodation drawer and indorser. *Ibid.*

§ 523. This was an action by an indorsee of a note, made as a *bona fide* business transaction and not suspected of any usury in its origin, or made up for the purpose of raising money in the market, against the indorser thereof. The lower court gave instructions which affirmed the proposition that in the sale of such a note for a sum so much less than its face as to exhibit a discount beyond the legal rate of interest, the guaranty or indorsement of the note, without a stipulation against the indorser's liability, made out a case of usury, that is, a *per se* usurious contract upon which no action could be maintained; and that such guaranty and indorsement necessarily implied a loan. The supreme court reversed the case, being of opinion that this proposition was erroneous, and that the plaintiff could recover if the transaction was in fact a mere sale of a note and not a loan. *Nichols v. Fearson*, §§ 530-31.

[NOTES. — See §§ 532-535.]

## PALMER v. CALL.

(Circuit Court for Iowa: 2 McCrary, 522-530. 1881.)

STATEMENT OF FACTS.—Burnham, as agent for Mrs. Davison, loaned Call \$8,000, taking his note for \$10,000, as well as semi-annual notes of \$500 each for interest. The \$2,000 difference between the face of the note and the amount received by Call, Burnham kept as his own *bonus*, Mrs. Davison supposing that the whole of her \$10,000 had been received by Call. Burnham retained the note as agent for Mrs. Davison, it being made payable to him. Palmer, some time afterwards, purchased the note from Burnham, paying him \$10,000 in cash for it. The interest had been paid up to the time of the purchase. There was, after some time, an extension of the debt, a new note given for \$11,000, and Palmer paid \$1,000 to Burnham, who kept half of it as another *bonus*, without any notice to Palmer. This was a suit to foreclose the mortgage, and the usury above indicated was set up as a defense.

Opinion by LOVE, J.

It is well settled that to make a loan usurious there must be an intent on the part of the lender to take more than the legal rate of interest. Tyler on Usury, 103; Condit v. Baldwin, 21 N. Y., 219; Loyd v. Scott, 4 Pet., 205 (§§ 436-40, *supra*); U. S. Bank v. Waggener, 9 Pet., 309 (§§ 452-59, *supra*); Jones v. Berryhill, 25 Ia., 289.

§ 524. *If an agent, without the knowledge of his principal, exacts more than legal interest, the loan is not thereby rendered usurious.*

Doubtless, in general, the intent of an agent acting within the scope of his authority may be imputed to the principal. But it is settled beyond question that if any agent in good faith makes a loan for another, and without the knowledge or authority of his principal, and for the agent's own benefit, exacts more than legal interest, the loan is not thereby rendered usurious. In such case the law does not impute the knowledge and the intent of the agent to the principal. This doctrine is supported by numerous authorities both in England and this country. Tyler on Usury, 156-172; Dagnel v. Wigley, 11 East, 43; Solartee v. Melville, 7 Barn. & Cress., 427; Coster v. Dilworth, 8 Cow., 299; Condit v. Baldwin, 21 N. Y., 219; Smith v. Marvin, 27 N. Y., 137; Bell v. Day, 32 N. Y., 165; Baxter v. Buck, 10 Vt., 548; Muir v. Newark Ins. Co., 16 N. J. Eq., 537; Canover v. Van Mater, 18 N. J. Eq., 486; Rogers v. Buckingham, 33 Conn., 81; Hopkins v. Baker, 2 P. H. (Va.), 110; Gokey v. Knapp, 44 Ia., 32; Myllis v. Ault, 45 Ia., 46; the result summed up in 17 Alb. Law Jour., 116; Barret v. Snowden, 5 Wend., 181.

I have the greatest confidence in the correctness and stability of this rule from the fact that it rests upon solid foundations of reason and justice. The lender employs an agent to loan his money. He gives the agent no authority to violate the law. He has no knowledge of the fact that usurious interest is extorted. He has no intent to receive, and does not receive, more than the law allows. He derives no benefit from the illegal transaction. But the agent and borrower, without the knowledge, consent or authority of the lender, enters into an illegal contract for the payment of excessive interest. The borrower and agent are guilty parties. They knowingly violate the law. They are *particeps criminis*, though it may be in unequal degrees. They knowingly put the lender's money in jeopardy without the least pecuniary advantage to him. It is the lender who is prejudiced and injured by such a transaction. Would it not be most unjust to inflict the pecuniary loss upon

the lender, who is without fault and free from any illegal intention, in favor of a party who has knowingly and wilfully participated in the violation of the law? Would it be consistent with sound morality so to do? What right has the borrower to assume or to believe that the lender's agent is authorized by his principal to violate the law by the taking of usurious interest? The lender's agent is either a special or a general agent. If he is specially empowered to negotiate the particular loan and no other, it is the legal duty of the borrower to look to the special authority, and the principal is not bound beyond the special authority. If he is a general loan agent the limitation is that he must keep within the usual and ordinary scope of the business committed to him. The borrower must determine the extent of the authority by considering what is the usual and ordinary course of that business. Is it within the usual and ordinary course for an agent to take excessive interest in violation of the law? Such a practice is *extraordinary*. It is *without* the usual course of business.

The natural and proper inference for the borrower to draw from the fact of the agent's proposing to take illegal interest would be that in so doing he would be acting without the authority of his principal. It may be said that the principal is responsible for the frauds of his agent in the course of the business committed to him, even though the principal should be ignorant of the fraudulent acts or should expressly prohibit them. Very true; but in this case there are two innocent parties — the principal and the party defrauded. One of the two must needs suffer from the fraudulent acts of the agent; and it is the dictate of reason and justice that where one or the other of these innocent parties must suffer, the loss should fall upon him who put it in the power of the agent to commit the fraud, rather than him who had no lot nor part in choosing the agent, or placing him in a position to do the mischief. But in the case of usury contracted for through an agent the borrower is not innocent. He participates knowingly in the violation of the law. He has no merit to plead in his defense; while the lender, in the absence of authority given by him, or knowledge of the violation of the law, is wholly innocent and entirely free from moral guilt. Indeed, it smacks strongly of fraud in the borrower to enter into a contract with the lender's agent to pay usurious interest without any inquiry whatever into the authority of the agent to make an unlawful contract, which the borrower knows cannot be enforced, for in this way the borrower, in connivance with the agent, gets the lender's money with the intent, demonstrated by his subsequent plea of usury, to avoid the fulfillment of his contract.

Now if the principle thus stated, which is so just in itself and so firmly supported by authority, be sound law, it is decisive of the present case, for it is evident that neither Mrs. Davison nor the plaintiff had any knowledge whatever of the retention by Burnham, Ormsby & Co. of the respective bonuses of \$2,000 and \$500. They did not authorize the usury. They received no benefit from it. They paid the full sums for which they respectively received the defendant's notes. If, therefore, it be granted as a fact that A. C. Burnham was Mrs. Davison's agent in making the original loan, and that Burnham, Ormsby & Co. were the plaintiff's agents in negotiating the second loan, it would make no difference in the decision of the question in this case. The plea of usury must still be overruled. I cannot assent to the proposition of defendant's counsel that in the original transaction A. C. Burnham was the lender of the money, because he failed to disclose his principal and took the

notes in his own name. The money belonged to Mrs. Davison. A. C. Burnham was her agent in making the loan of it. They both treated the notes as the property of Mrs. Davison, and she received the interest upon them. A. C. Burnham had in fact no real interest in the loan, except as trustee for Mrs. Davison. He would have lost nothing if a plea of usury had been sustained. The penalties would have fallen upon Mrs. Davison, and it is therefore her intentions and her acts, not the acts and intentions of A. C. Burnham, that are to be considered in determining whether or not the penalties of usury shall be inflicted. The act of an agent in taking notes upon a loan of his principal's money in his own name does not make the agent the lender.

§ 525. *Where a usurious obligation is passed for value to an innocent purchaser without notice of the usury, the maker cannot set up the defense of usury.*

But even if we grant the proposition that A. C. Burnham was in fact the lender, it will not avail the defendant in this case, for it is a legal proposition well settled in our jurisprudence by the most respectable authorities, that where a usurious obligation passed for value to an innocent purchaser without notice of the usury, and where the innocent assignee takes a new and substitute security for the debt, there being no taint of usury in the second transaction, the plea of usury to the substituted obligation cannot be sustained. So long as the usurious contract remains in the hands of the original party to it, no change in the form of the security will have any effect to purge it of the taint of usury; but where it has passed for value into the hands of an innocent assignee the rule is different. *Ellis v. Warner*, —, 752; *Cuthbert v. Haley*, 8 Tenn., 890; *Powell v. Waters*, 8 Cow., 669; *Kent v. Walton*, 7 Wend., 257; *Dix v. Van Weyck*, 2 Hill (N. Y.), 522; *Smedbury v. Simpson*, 2 Sandf., 87; *Smedbury v. Whittlesey*, 3 Sandf. Ch., 323; *Smalleys v. Dougherty*, 3 Bosw., 66; *Houghton v. Payne*, 26 Conn., 396; *Brown v. Waters*, 2 Ch. Cas., 209; *Bearce v. Barston*, 9 Mass., 44; *Campbell v. McHarg*, 9 Ia., 357; *Wendlebone v. Parks*, 18 Ia., 544.

§ 526. *Construction of statutes of Iowa on usury.*

It is needless to say that the present case is clearly within this principle. The plaintiff was an innocent purchaser of the original notes for value. He not only took a new and substituted security, but the new obligation was founded upon additional considerations—the extension of time and the advance of a further sum of money. There was no usury in the second loan which could, as we have shown, affect him. The argument of counsel, that the true construction of sections 2079 and 2081 of the codes is repugnant to the principle that a new and substituted security in the hands of an innocent assignee avoids the usury, is to my mind plausible but inconclusive. These provisions have not yet been construed as applicable to such a security, and I think it is quite unnecessary so to construe them. The provision of section 2081 is that nothing in the statute shall be construed —

“To prevent the proper assignee in good faith and without notice of any usurious contract from recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money.”

It seems to me that this provision was merely intended to give the assignee without notice a remedy where he had none before; that is, where he stood upon the original usurious contract without any new security. In most cases we may assume that the debtor would not execute to the innocent assignee a new security for the usurious debt, and in all such cases the innocent holder

could recover from the debtor only the "principal money." The statute comes to his relief by giving him a right to recover against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money. It is a wholly different case where the debtor himself gives to the innocent assignee, who pays full value and takes no usury, a new and substituted obligation, especially where such obligation is founded upon some new and sufficient consideration. In this case the assignee would have a sufficient remedy against the debtor upon the new contract by the principle of the common law to which I have adverted, and therefore the provision of the statute would be inapplicable to his case and unnecessary to his protection.

As to the words of the section relied upon by counsel to support the construction that "no person shall directly or indirectly receive in money, goods, or things in action, or in any other manner, any greater sum or value for the loan of money" than ten per cent., they are sufficiently answered by the fact that the innocent assignee does not receive more than ten per cent. on the sum by him advanced. If he does receive more, his new contract in its turn becomes usurious and subject to the penalties of the statute. It is my opinion that it was not the purpose of the legislature to make our statute of usury apply at all to negotiable bills and notes in the hands of the *bona fide* holder. It would certainly be a most serious obstruction to the free circulation of commercial paper to subject it to the law of usury. Can it be that our legislature intended that every one in money transactions, before receiving a bill or note under-due, should stop to inquire whether or not it has upon it the taint of usury? I think not. It has long been the settled law that where a statute by its terms makes a note or bill absolutely void, the instrument is invalid in the hands of a *bona fide* holder for value. But where a statute declares a contract illegal, but only voidable, a negotiable note or bill founded upon such voidable contract is good in the hands of a *bona fide* holder. This doctrine has been applied by the courts to statutes of usury as well as other penal statutes. Now our statute does not make a usurious contract void; indeed, such a contract is only voidable as to the excess of interest. Did our legislature intend, in this respect, to overturn one of the great principles governing commercial paper in this and other countries? It is noticeable that the legislature does not, in the sections just referred to, use terms appropriate to commercial paper. The language is that the proper "assignee," not indorsee, shall be entitled to the remedy over against the usurer.

In strict legal parlance we do not use the term "assignee" when we mean to designate the indorsees of bills and notes. I am, therefore, inclined to think that the legislature, in using the term "assignee," did not mean to provide for innocent indorsees of mercantile paper who were already amply protected by the law merchant, but for that large class of assignees who, in the absence of such a provision, would step into the shoes of their assignors with just the same rights, remedies and equities to which their assignors are entitled, and none other.

Judgment for the complainant.

DAVIS, BROOKS & CO. v. CLEMON.

(Circuit Court for Ohio: 6 McLean, 622-630. 1855.)

Opinion of the COURT.

STATEMENT OF FACTS.—This action is brought on a bill of exchange dated 1st June, 1850, by Clemson, payable to his own order, on Suydam, Sage &



Co., for \$5,000 payable in four months, and indorsed by him. Several special pleas were filed by the defendant, substantially the same. Among other things they set out that the cause of action in the different counts of the declaration are the same; that the bill was drawn for the accommodation of Suydam, Sage & Co., who were to pay it at maturity, of which the plaintiffs had notice; that they accepted the paper, and afterwards made a corrupt and usurious agreement with the plaintiffs to loan from them \$1,869.99 until October 4, 1850, for the sum of \$130, and to receive the above bill accepted by Suydam, Sage & Co.; which sum so paid as interest was more than seven per cent. per annum on the sum loaned, in violation of the statutes of New York, which declare all instruments void founded on a usurious consideration. To these pleas the plaintiffs filed a general demurrer.

§ 527. *What is the contract of a drawer and an indorser of a bill of exchange.*

As the demurrer admits the facts stated in the pleas, the law must be applied to the facts. The main stress of the argument by the plaintiffs' counsel is, that the drawer of the bill who indorsed it, is a citizen of Ohio; and that the contract must be considered as governed by the laws of Ohio. It is admitted that the drawer and indorser, whether the same person or different persons, do not contract to pay the money in the place on which the bill is drawn; but only to guaranty its acceptance and payment in that place by the drawer. And it is also admitted that the liability of both the drawer and indorser arises under the law of the place where, in legal contemplation, the bill was drawn or indorsed.

And it is also admitted, that where a valid instrument is created, untainted with usury, that a subsequent usurious negotiation of it cannot be pleaded by the drawer in discharge of his obligation. That in such a case the question of usury is limited between the indorser and the indorsee, but does not reach or taint the original instrument. There are authorities which do not go this length, but the weight of authority sustains the principles above stated, and they embrace the legal ground assumed by the plaintiffs' counsel. *Nichols v. Fearson*, 7 Pet., 110 (§§ 530-31, *infra*); *Munn v. Commission Co.*, 13 John., 55; *Lloyd v. Scott*, 4 Pet., 229 (§§ 436-40, *supra*); *Beaman v. Hess*, 13 John., 52.

§ 528. *A bill drawn, indorsed and accepted is blank paper until negotiated.*

The bill in question was signed by Clemson and indorsed by him, and then it was transmitted to Suydam, Sage & Co., in New York, who accepted it, and by them it was offered to the plaintiffs of New York, who discounted it, reserving a rate of interest which, by the law of New York, was usurious.

This bill was blank paper when it was transmitted by Clemson to Suydam, Sage & Co., and after it was accepted by them it was nothing more than blank paper. It was intended for the benefit of the acceptors, but thus far there was no liability by the drawer, indorser or acceptors. No action could be sustained on it. It was then, in contemplation of law, no contract or bill of exchange. Until negotiated, it was, in effect, blank paper. It was susceptible of being made a valid bill by filling up the blanks, and passing it *bona fide* to a third party.

In *Smith v. Mingay*, 1 Maule & Sel., 87, it was held that where a merchant in Ireland sends to England certain bills of exchange, with blanks for the dates, the sums, the times of payment, and the names of the drawers, signed and indorsed by himself, with a request that his correspondent in England would fill up the blanks, who did so with a date at a place in Ireland, the

bills were held to be Irish contracts. And Mr. Justice Bailey held in the same case, if the bills had been negotiated to an innocent indorsee, after the death of the drawer, his representatives would have been bound.

But if these Irish bills had been signed by the drawer for the accommodation of the acceptor, and they had been filled up and negotiated on a usurious consideration, could the usurious holder have recovered their amount from the drawer? These Irish bills were drawn for the benefit of the drawer; the drawees were his debtors or securities, and the bill was to pay the debt of the drawer. The transaction was *bona fide*, and altogether different from the one before us.

It is true no additional name was added to the paper, but that on principle can make no difference. The act of negotiation imparted to the bill validity, if it be a valid bill. Without this, the bill with the names upon it was of no validity. It was not the signature of Clemson, or the signatures of the acceptors, but the loan of the money on the credit of the bill, which could give effect to it. And here the question arises, whether that which was essential to give effect to the bill did not enter into its inception. Whether that without which the paper constituted no bill of exchange does not constitute a part of it.

But it is argued by the plaintiffs that Suydam, Sage & Co. did not indorse the bill, and that they claim under the blank indorsement of Clemson. If the bill had been an effective instrument as between the parties, before it was negotiated, the argument would be unanswerable. But as its negotiation was essential to its vitality, the argument is without application to the case. On principle, these positions would seem to be clear, and they are also clear on authority. "If a bill of exchange be drawn in consequence of a usurious agreement for discounting it, although the drawer to whose order it was payable was not privy to this agreement, still it is void in the hands of a *bona fide* indorser." 2 Comp., 599. In Holt's N. P., Lord Ellenborough lays down the law that a *bona fide* holder cannot recover upon a bill founded in usury; so neither can he recover upon a note where the payer's indorsement, through which he must claim, has been made by an usurious agreement. But if the first indorsement be valid, a subsequent usurious indorsement will not affect him, because such intermediate indorsement is not necessary to his title to sue the original parties to the note. Lloyd v. Scott, 4 Pet., 229 (§§ 436-40, *supra*).

In Nichols v. Fearson, 7 Pet., 106 (§§ 530-31, *infra*), the court say: "It is necessary to bear in mind that we are not now called upon to consider a case occurring upon the transfer of a note which is, in its origin, a mere nominal contract, one on which, as the test is very properly established in the New York courts, no cause of action arose between the original parties. The present is a case of greater difficulty." "It will hardly be contended that although the indorsement gave no cause of action against the indorser, yet it did operate to give a right of action against the maker of the note."

In the case of Munn v. The Commission Co., 15 John., 55, the court say: "If a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it can, as between themselves, maintain a suit upon the bill when it becomes mature, provided it had not been discounted, that then such discounting of the bill would be usurious and the bill must be void."

The counsel for the plaintiffs admit, at least tacitly, that the negotiation of

this bill was void under the laws of New York, by the argument that it is an Ohio contract, and is, consequently, governed by the laws of Ohio. The legal obligation which arises against the defendant, whether as drawer or indorser, it is contended, is not that he shall pay the money positively, but that he will pay it, if the acceptors do not pay it at the maturity of the bill, provided payment shall be demanded and a legal protest made, and he shall be duly notified of the same.

§ 529. *By the law of New York usury avoids a contract. If an instrument be void for usury as to a principal debtor it is void as to accommodation drawer and indorser. Case cited.*

There is no expression on the face of this contract where the money was to be paid. In such an obligation, unless there was something in the negotiation of the instrument to change the effect of it, the place of payment is taken to be the domicile of the person bound. But on such a contract the party is liable wherever he shall be found. Where was the bill in question made, and under what law? The plaintiffs who discounted it were citizens of New York, and so were Suydam, Sage & Co. The latter were bound to pay the bill at maturity. That it was usurious and void, as to them, will not be controverted. And if this be so, how can a void act create a liability against the defendant, either as an accommodation drawer or indorser? As before shown, until the plaintiffs discounted the bill it had no binding effect upon the defendant. And if by reason of the usury this discount imposed no obligation to pay on the acceptors, for whose benefit the bill was drawn, can it be binding on his sureties? If an instrument be void for usury as to one, it is so as to all; and any party may set up the defense. *Austin v. Tuttle*, 12 Barb., 360. The case of *Andrews v. Pond*, 13 Pet., 65 (§§ 318-27, *supra*), arose on the following bill of exchange:

“Exchange for \$7,287.78.

NEW YORK, March 11, 1837.

“Sixty days after date of this first of exchange, second of same tenor and date unpaid, pay to Messrs. Pond, Converse & Wadsworth, or order, \$7,287.78, negotiable and payable at the Bank of Mobile, value received, which place to the account of your obedient servant.

D. CARPENTER.

“To Messrs. Sayre, Converse & Co.,

“Mobile, Alabama.”

The bill was indorsed by Carpenter, the drawer, who, as well as the drawees, were citizens of Alabama. The bill was drawn to pay a debt admitted to be due to H. M. Andrews & Co., of New York. But the amount stated in the bill included a prior indebtedness with ten per cent. on it to cover exchange, and which appeared to have been done to avoid the statute of usury.

In their opinion, the court say, “the defendants allege that the contract was not made in reference to the laws of either state, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange in order to evade the law. Now if this defense is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon usurious agreement, which neither will execute. Unquestionably, it must be the law of the state where the agreement was made and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In such cases the legal consequences of

such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere."

In that case it was argued by Mr. Webster, as the counsel in the case before us have argued, "that the contract is to be governed by the laws of the place where it was to be executed. The contract on the face of this bill of exchange expresses that it was to be executed elsewhere than where it was made. The parties entered into it with a view to its performance at another place. It is a foreign bill, and of course is dated in one place, and in one state, and made payable in another."

In that case the usury was included in the body of the bill, but the bill was made payable in Alabama, and all the defendants were citizens of that state. It was an Alabama contract, in a much stronger point of view than the one before us was an Ohio contract. The effect of usury in New York was to avoid the instrument; in Alabama the interest only was avoided.

In the case under consideration the bill, as between the parties, was as blank paper until it was negotiated to the plaintiffs on a usurious consideration. Could the plaintiffs sue the acceptors, who were and are citizens of New York? This will not be contended. They were citizens of New York, and acted under the laws of New York. They were the principals in the transaction, and the usury releases them from all liability on the bill.

Admit that the imperfect bill was forwarded to the acceptors by the defendant, to be filled up by them; to bind him must they not act in good faith, and must not the party who discounts the bill act in good faith? Can the plaintiffs complain that they should be governed by the laws of their own state? In the defense it is averred that they had notice that the defendant was an accommodation drawer and indorser. He therefore can only be made responsible on strict principles of law.

If the bill had been a valid instrument, as between the parties to it; if an action could have been sustained against the acceptor by the drawer for non-payment, at maturity, and it had been negotiated *bona fide*, it is admitted (the bill having been signed and indorsed in Ohio, from which facts the legal liability arises, on the failure of payment by the acceptors, so far as the defendant is concerned) it would have been an Ohio contract. But it is denied that any liability against the defendant can arise, he being an accommodation drawer and indorser, on a usurious negotiation of the bill in the hands of the person who thus obtained it. It is void by the act under which it was negotiated. Not void in part, but in whole. Void not only as against the acceptors, for whose benefit it was negotiated, but also as against the accommodation drawer and indorser.

If the facts alleged in the pleas shall not be established before a jury, the rulings now made will not apply. Demurrer overruled.

NICHOLS v. FEARSON.

(7 Peters, 103-112. 1833.)

ERROR to the Circuit Court of the District of Columbia.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This was an action by the indorsee against the indorser of a promissory note, in which the plaintiff here was plaintiff in the court below. It comes up upon exceptions taken to certain instructions given at the instance of the defendant, and to the refusal of other instructions prayed for by the

plaintiff. On the motion of the defendants, the court instructed the jury "that if they believed, from the evidence, that the plaintiff received the note in question from the defendants, with their indorsement upon it, and without any understanding that the defendants were not to be responsible upon their indorsement," at a discount beyond the legal rate of interest, then the transaction was usurious and he could not recover. The plaintiff then moved the court to instruct the jury to this effect: "that if they believed the evidence made out a case in which there was no loan contemplated, nor any evasion of the laws against usury, but simply a sale of the note in question, then the transaction was not usurious and the plaintiff was entitled to recover," which instruction the court refused.

The case makes out the note to have been a *bona fide* business transaction, not suspected of usury in its origin, or made up for the purpose of raising money in the market; and the decision of the court below of course affirms this proposition, "that in the sale of such a note, for a sum so much less than that on its face, as will exhibit a discount beyond the legal rate of interest, the guaranty or indorsement of the note, without a stipulation against the indorser's liability, makes out a case of usury; that it is, *per se*, a usurious contract between the indorsee and indorser; and no action can be maintained upon it against the indorser. And since the rule is universal that there can be no usury where there is no loan, it follows that their decision implies the affirmance of the proposition that such a guaranty or indorsement necessarily implies a loan.

It is necessary to bear in mind that we are not now called upon to consider a case occurring upon the transfer of a note which is, in its origin, a mere nominal contract, one on which, as the test is very properly established in the New York courts, no cause of action arose between the original parties. 15 Johns., 44, 55. The present is a case of greater difficulty, for the principle affirmed in the decision under review operates indirectly upon a contract not affected by usury; since by leaving the possession of the note in the indorsee, who has no cause of action, and the cause of action, if anywhere, in the indorser, who has parted with the possession of the note, it virtually discharges the promisor from liability, although his contract, in its conception, may have been wholly unimpeachable. Yet the rule of law is everywhere acknowledged, that a contract free from usury in its inception shall not be invalidated by any subsequent usurious transactions upon it.

§ 530. *Where a note is valid at its inception, and is negotiated at a usurious discount, the indorsee may maintain an action against the indorser.*

It will hardly be contended that although the indorsement gave no cause of action against the indorser, yet it did operate to give a right of action against the maker of the note. The statute declares a usurious contract to be invalid to all intents and purposes whatever; a valid indorsement is a contract as well of transfer as of provisional liability, and if invalid to the one purpose, it must be equally so to the other.

The courts of New York have got over these difficulties by adjudicating that whenever the note or bill, in its conception, was a real transaction, so that the payee or promisor might at maturity maintain a suit upon it, a transfer by indorsement on a discount, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so where the paper, in its origin, was only a nominal negotiation.

Such is the result of the decisions in *Jones v. Haik*, 2 Johns., 60; *Wilkie v. Roosevelt*, 3 Johns., 66; and *Munn v. The Commission Co.*, 15 Johns., 44.

It has been argued that the Massachusetts courts maintain the contrary doctrine. But the cases cited will not be found sufficient to bear out the argument. The case of *Churchill v. Suter*, 4 Mass., 156, was the case of a nominal contract, a note made to be sold in the market, as is admitted in the case stated; the point of usury was not argued, and the opinion expressed by the learned judge was at best but an *obiter dictum*. However, let that opinion be confined to the *res subjecta*, and there can be no reason for controverting it in this case. It was the case of a nominal sale; a loan with the disguise of a sale thrown over it.

The case of *Bridge v. Hubbard*, 15 Mass., 96, was one of a different character, and decided in conformity with another class of cases. It was the case of the substitution of a new contract for a note given for usurious interest due upon previous transactions. The note passed into the hands of innocent indorsees, and the question was whether it was affected with the taint of the original usury, or only with the want of consideration. And the majority of the court held it to be a security for a loan of money obtained upon usury, and therefore void in the hands of the present holders. This, of course, is not an adjudication in point.

The case of *Lloyd v. Keach*, 2 Conn., 175, cited from the adjudications of Connecticut, is in point; but it is an authority against the decision under review. The note was given in the course of business, and in a suit brought upon it by the indorsee against the drawer, the inferior court decided that the sale of such a note by the indorser on a discount exceeding the legal rate of interest was rendered usurious by his indorsement and guaranty, and that the plea of usury was a good bar to a suit instituted against the drawer. But, on an appeal to the supreme court of errors, although there was a considerable diversity of opinion among the judges, a new trial was granted upon the ground that such a transaction was not, *per se*, usurious, but that its validity must depend upon the *bona fides* of the transaction as being a pure, unaffected sale, or merely a color for a loan.

Upon a subject of such general mercantile interest we must dispose of the question according to our own best judgment of the law. And it becomes necessary first to review some of our own decisions which have a bearing upon it. The first was the case of *Levy v. Gadsby*, which was an action by indorsee against indorser upon a note which would seem to have originated in a real transaction, and the defense was usury. But the distinction between that case and the present is, that the defense was not set up in that case upon any interest or discount taken for the transfer of the note, but upon a usurious negotiation for a loan or forbearance with reference to a pre-existing debt, in consideration of which Gadsby's note was indorsed to the plaintiff, and thus came within the description of "an assurance for forbearance," which is made void by the statute, as well as the contract secured (3 Cranch, 180); and the usury there was proved, not inferred from the guaranty by indorsement.

The case of *Gaither v. Farmers' and Mechanics' Bank*, 1 Pet., 37, was one precisely of the same character with that of *Levy v. Gadsby*, except that the suit was instituted by the indorsee against the drawer; the cause was decided upon the invalidity of the indorsement to transfer the right of action to that indorsee, not to any other holder, the plaintiff being the party to the usury.

A usurious loan had been negotiated, and Gaither's note to Corcoran, the borrower on usury, indorsed in blank by Corcoran, and left with the plaintiff to collect, in payment of the money borrowed. It was therefore a clear case of an assurance given for money borrowed on usury; and in no way could a court permit the borrower to avail himself of the indorsement without violating the statute. We recollect no other case in which this court has been called upon to consider the effect of usury upon the contracts of parties to negotiable paper. We are, therefore, uncommitted upon the question now before us, and free to decide it, as well upon reason and principle, as upon what appears to us to be the weight of authority.

§ 531. *To constitute usury a loan must be contemplated by the parties; and a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction.*

There are two cardinal rules in the doctrine of usury which we think must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred. The first is, that to constitute usury there must be a loan in contemplation by the parties; and the second, that a contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction.

It is true with regard to the first of these canons, that there are cases which necessarily import a loan, and no disguise, no affectation of sale or barter, can devert them of that character; such, for instance, as a man selling his own bond or note, executed, say in blank; and when these cases occur the law puts the stigma upon them without further inquiry. The instrument having had no virtual existence until the loan or sale was negotiated, could in nowise be regarded as a transfer of property. But he who sells his lands or stock, and takes a note in payment, holds in his hands the representative of property, an entity to which the improvements of society have attached all the rights and characteristics, in equity at least, which were the acknowledged attributes of the property for which it was received. A promise to return the money borrowed is, indeed, one among the ordinary indications of a loan; and upon the idea that the contract of an indorser could not be distinguished from a general engagement to repay, have the decisions in the Connecticut case and in the court below, in the case at bar, been rendered. But the grounds of distinction are material, for the contract between indorser and indorsee is, at best, but a conditional or provisional contract; the indorsement of a business note produces a real transfer of interest, and the indorsement may well be regarded in the light of a guaranty against the insolvency of the promisor. In the case of an assignment of a bond, with a guaranty against insolvency, which every assignment in Virginia and Kentucky imports, it has been adjudged, in both those states, that usury does not avoid the effect of the assignment. That the transfer of the right of action on the bond is complete, and if valid for one purpose, it is presumed it must be so to every one. *Littell v. Hord*, Hardin, 81; *Hansborough v. Baylor*, 2 Munf., 36.

These observations are made to show that the indorsement of this note did not necessarily import a loan. But we are not to be understood as intimating that if, in a treaty for or conclusion of a loan, the indorsement be expressly stipulated for as security for repayment, the contract being usurious may not invalidate the indorsement under the character of a security or assurance. Such was the decision in Gaither's case in this court, and these remarks only

go to show that an indorsement, without a stipulation against ultimate liability, does not necessarily imply a case of usury.

And in this we are sustained by the argument *ab inconvenienti*, or *ducitur absurdum*, which would result from the contrary doctrine, if considered with relation to the second canon or general rule respecting usury, as before laid down, to wit: That a contract free from usurious taint in its inception is not to be invalidated by any subsequent usurious transaction; since, as has been shown, by converting a sale on a discount into a loan on usury, and thus rendering null and void the act of indorsing it, a contract wholly innocent in its origin, and binding and valid upon every legal principle, is rendered, at least, valueless in the hands of the otherwise legal holder; and a party to whom the provisions of the act against usury could never have been intended to extend, would be discharged of a debt which he justly owes to some one.

Such inconsistencies are not to be lightly incurred; it is enough to submit to them when they become unavoidable; but it is easy to assign other and adequate motives for selling a note and then indorsing it, without imputing to the transaction the negotiation of a loan; and it is enough if the imputation be not unavoidable. The acts against usury were intended to protect the needy; but the holder of a note may be wealthy, may be the lender, not the borrower of money, and yet find an adequate motive both for selling a note and guarantying it. Suppose the debtor absconds, or removes to the Arkansas or the Oregon, the very wealth of the holder may make it no object to follow him or prosecute a suit against him; his freedom, from necessity, may be the holder's motive for parting with the note to another at a moderate sacrifice; his indorsing it will diminish that sacrifice, and, although removing, the debtor may be wealthy, and the inducement for the indorsement may be the conviction that the debt is safe — that he will never have to repay what he has received. There could be inferred no treaty for a loan from such a transaction, nor any device to evade the statute. It is a plain contract of bargain and sale, with a warranty of the soundness of the property.

We have not had leisure fully to explore the decisions of the states on the question, but, as far as we have gone, the great weight of authority is certainly in favor of the validity of the contract under review. The courts of Kentucky have recognized the validity of such a transfer in a case of admitted usury between the assignor and assignee of a bond. *Littell v. Hord*, Hardin, 82. The courts of Virginia have given validity both to the assignment of a bond and the indorsement of a note, expressly created for sale, and sold at a usurious discount, where there was no proof of a negotiation for a loan. 2 Munf., 36, and 5 Rand., 33. Those of Maryland also have lent their sanction to the doctrine in the case of *Kenner v. Herd*, 2 Hen. & Munf.; and in South Carolina such has long been the established doctrine. 1 Bay, 456; 3 M'Cord, 365.

On the question whether the plaintiff may recover the whole amount of the note, or only according to the value of the consideration paid, it will be observed we are not called upon to express an opinion. Upon the whole, we are of opinion that, upon both reason and authority, the law is in favor of the plaintiff; and that the court below erred, both in the instructions given for the defendants, and in refusing those prayed for by the plaintiff. Judgment reversed and a *venire de novo* awarded.

§ 582. **Innocent purchasers.**— Under the laws of Illinois a *bona fide* purchaser of a draft is not chargeable with usury. *Tilden v. Blair*, 21 Wall., 241.



§ 533. Where checks payable to bearer were loaned to a person for his accommodation to raise money upon, it was held that one who purchased them of a broker was affected by usury though he did not know of it when he purchased them. *Hill v. Scott*,\* 5 Cr. C. C., 523.

§ 534. Usurious securities are void not only as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. *Lloyd v. Scott*, 4 Pet., 203 (§§ 436-40).

§ 535. Dishonored bill.—One who takes a bill which upon its face is dishonored cannot be allowed to claim the privileges of a *bona fide* holder without notice, as against the defense of usury in the original inception of the bill. And it makes no difference for this purpose whether it is taken after non-acceptance or after non-payment. *Andrews v. Pond*, 13 Pet., 65 (§§ 318-27).

## V. EFFECT OF USURY.

**SUMMARY**—A prohibition in a statute, either with or without a penalty, makes the contract void, § 536.—In bankruptcy, § 537.—Under a constitutional provision, without an enactment, §§ 538, 539.

§ 536. If a law prescribes the legal rate of interest, and declares that no more shall be contracted for or received, this prohibition renders any contract to the contrary illegal and void *in toto*, the same as if the statute had expressly declared such to be the result. And where the statute also fixes a penalty, a contract or transaction contrary thereto is absolutely void, unless upon a consideration of the whole act it appears that the legislature did not so intend. Where the penalty consisted of a forfeiture of the entire debt to the school fund, upon suit being brought to recover the debt, it was held this did not indicate an intention on the part of the legislature not to make the contract absolutely void; and that a debt contrary to this statute could not be allowed in bankruptcy. *In re Pittock*, §§ 540-43.

§ 537. The bankruptcy act having prohibited the allowance of a claim arising in illegality, the bankruptcy court will reject a claim which is illegal under the local law for usury, although it has no jurisdiction to enforce all of the penalties consequent upon the illegal transaction. It will disallow the debt where the local statutes forfeit it to the school fund. *Ibid.*

§ 538. The constitution of Maryland of 1851 provides "that the rate of interest in this state shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury." This provision is mandatory, and makes it the duty of the legislature to punish usury; the last clause does not qualify the meaning of the words preceding. This provision repeals the act of 1845, avoiding the contract only as to the excess. It cannot be argued that because the act of 1704, prohibiting usury, also declares the contract void, the constitution in omitting the latter provision intended to legalize the contract as in the act of 1845. *Dill v. Ellicott*, §§ 540-47.

§ 539. Under the constitution of Maryland of 1851 declaring "that the rate of interest in this state shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary penalties and forfeitures against usury," no action can be sustained upon a contract reserving a higher rate of interest than six per cent. The contract is absolutely void. And this although the legislature has prescribed no forfeitures of penalties. *Ibid.*

[NOTES.—See §§ 548-566.]

## IN RE PITTOCK.

(Circuit Court for Oregon; 2 Sawyer, 416-428; 8 National Bankruptcy Register, 78. 1873.)

**STATEMENT OF FACTS.**—A claim was made by Potter against the estate of the bankrupt, which was contested by the assignee on the ground that \$20 usury was received for the use of \$370. There was no question as to the fact. Potter counted out the money, Pittock gave him his note, bearing interest at one per cent. per month, and when Potter asked how much would be allowed him for the accommodation, \$20 was handed back, which Potter took and went away.

Opinion by DEADY, J.

Section 23 of the bankrupt act, as above cited, prohibits the allowance of a claim in bankruptcy which is founded in illegality. In this respect the act is

only in affirmance of the common law. What is or is not an illegal contract or transaction depends upon the law of the place where the contract was made or the transaction had. The right of the creditor to prove this debt then depends upon the effect to be given to the usury act of the state of Oregon.

It is apparent, upon an examination of the books, that opinions as to the morality and policy of usury laws have frequently led to their being construed and refined away. The crafty means contrived by the wit and greed of man to evade the law have too often been successful, only because the private opinions and sympathies of courts and juries have interfered with its just and general enforcement.

But in this court, an act of the legislature limiting the rate of interest to be taken for the use of money will receive as favorable a construction as any other act emanating from that authority, to secure and promote what it deems to be the public good. It is for the law-making power to determine whether the rate of interest shall be limited, and not the courts. An act prohibiting the taking of interest beyond a certain rate should be construed, according to the general rule, with a view to effect its objects and promote justice.

§ 540. *Where a statute contains both a prohibition and a penalty, a contract contrary to it is absolutely illegal and void, unless it appears that such was not the intention of the legislature.*

Is a contract to receive more than lawful interest illegal and void under this act? It prescribes the legal rate of interest, and declares that "no more" shall be contracted for or received. This is a prohibition, and any contract contrary thereto is illegal and void, the same as if the act had expressly declared such to be the result. In *Bank of United States v. Owens*, 2 Pet., 538 (§§ 449-51, *supra*), the supreme court held that a contract contrary to a clause in the act incorporating the bank, which forbade it to take a greater interest than six per cent., but did not declare such contract void, was, nevertheless, necessarily illegal and void. In answer to the question, "whether such contracts are void in law upon general principles," the court say: "The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the hand-maid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummations of violation of law?"

In *Harris v. Runnels*, 12 How., 83 (CONTRACTS, §§ 452-56), cited and relied on by counsel for creditor, Mr. Justice Wayne says: "The object of all law is to repress vice and to promote the general welfare of society; and it does not give its assistance to a person to enforce a demand originating in its breach or violation of its principles and enactments. Contracts in violation of statutes are void. . . . A statute may either expressly prohibit or enjoin an act, or it may impliedly prohibit or enjoin it by affixing a penalty to the performance or omission thereof. It makes no difference whether the prohibition be express or implied. In either case a contract in violation of its provisions is void."

But the usury act (section 3) also affixes a contingent forfeiture or penalty to the violation of its terms in this respect, and counsel for the creditor maintains that when such is the case the ordinary effect of the prohibition is modified or mitigated so far as to leave the contract legal, subject to the penalty imposed for making it.

The case mainly relied on in support of this position is *Harris v. Runnels*, *supra*. The case was an action upon a note for the purchase of slaves sold in

Mississippi. Defense, that they were brought into the state in violation of a statute of the state which prohibited the bringing therein of convict negroes, and, as a means to that end, provided that no slaves should be brought into the state without a certificate, by two freeholders, describing them, and stating that they had not been guilty of certain crimes. The seller and purchaser of slaves brought into the state contrary to the act were each made liable to a penalty of \$100 for every violation thereof.

The court held that the parties to the sale of the slaves were liable for the penalty, but the contract itself was not void, because upon the whole act it did not appear reasonable that such was the intention of the legislature. The court freely admitted the general rule as stated, that a contract made contrary to a prohibition or a penalty was illegal and void, and added, "the rule is certain and plain; the practice under it has been otherwise. The decisions in the English courts have been fluctuating and counteracting. Those in the courts of our states have followed them without much discrimination."

The court then proceeds to notice some of the contradictions in the application of the rule and says: "We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only, for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

The rule furnished by this case seems to be as follows: Where a statute contains both a prohibition and a penalty, a contract or transaction contrary thereto is absolutely illegal and void, unless it appears, upon a consideration of the whole act, that the legislature did not so intend. Let us apply the rule to the case at bar. The act under consideration contains a prohibition against contracting for or receiving more than a certain interest. If this were all, it is admitted that a contract contrary thereto would be totally void. Counsel for creditor claims that the act also contains a penalty, because it provided in section 3 for forfeiting the entire debt, under certain circumstances, upon which usurious interest has been received or contracted for. Let this be admitted, and still it follows that an act in contravention of the statute is void, unless the contrary appears from the act itself. What is there in the provisions or object of this act that tends to prove that the legislature did not intend that a transaction in contravention of it should be void?

In *Harris v. Runnels*, *supra*, the facts that the act was passed to prevent the importation of negro convicts into the state, and not negro slaves generally, and that the prescribed certificate concerning the importation of slaves gen-

erally was only a means to secure that end, and lastly and chiefly, that the penalty prescribed for the violation of the act was merely \$100 instead of the forfeiture of the subject-matter of the prohibited sale and purchase, were held sufficient to show that the legislature did not intend to declare the contract of sale absolutely void. The prescribed penalty for the sale of a non-certificated slave being merely \$100, while his value was probably ten times that amount, there was much reason for inferring that the legislature thereby evidenced its intention not to punish the party by the further forfeiture of the value of the slave, if the purchaser did not choose to pay the purchase price, as would be the case, in effect, if the contract was held to be void absolutely.

§ 541. *Construction of statutes. Where an act contains an unqualified prohibition, and in certain contingencies a forfeiture, acts in contravention are illegal and void.*

But in this case the primary and palpable object of the legislature is to prevent the giving and receiving more than a certain rate of interest for the loan or use of money, as a thing contrary to the public good. The prohibition is unqualified, and reaches all cases of usurious interest under whatever name or device, promised, paid or received. But the penalty, which consists of a forfeiture of "the entire debt" to the school fund, is contingent upon two things: 1. A suit being brought to recover the debt; and 2. It being ascertained in said suit that the same is usurious.

In effect, there is no penalty imposed by the act for its violation, except in cases where the debtor declines to pay the debt, and in a suit to enforce payment, it appears that it is usurious. In such case the law converts the action of the creditor into one for the use of the public to whom the forfeiture is given — the school districts of the county.

A debtor may pay a debt tainted with usury with impunity. The law forbids the act, but prescribes no penalty for disobedience. But if payment of such a debt is sought to be enforced by a "suit," and the fact of its being usurious is "ascertained" or established therein, then the law intervenes, and directs that judgment for the amount of the sum loaned be given for the benefit of the parties for whose use the suit in contemplation of law in such contingency is brought.

The prohibition being absolute, and the penalty contingent and remote, it is a question whether this is a case of both a prohibition and a penalty within the rule in *Harris v. Runnels*. But admitting that it is, the cases are in every other material matter unlike. Here the penalty is contingent upon the action of the debtor, and is equal to the entire debt — neither more nor less. No penalty is imposed upon the debtor; on the contrary, he is relieved from the payment of any interest. So far as the creditor is concerned, the effect is the same as if no penalty had been imposed, for although he may maintain a suit for the usurious debt, it is only for the benefit of another. If no penalty had been provided, it is admitted that the contract, being prohibited, would be illegal and void. In either case the creditor loses his debt unless his debtor chooses to pay it. The conclusion is plain that the intention of the act is to make illegal and void all acts and contracts done or made in contravention of its provisions.

Counsel for creditor also cited *In re Moore*, 1 N. B. R., 123, and *Darby v. Boatman's Saving Institution*, 4 N. B. R., 196. The case is commented on in the opinion of the register, and shown to be against the claim of the creditor so far as applicable to the case. It arose under section 30 of the national

banking act (13 Stat., 108), which forbids the taking by the national banks of more than a specified interest, and prescribes a specified penalty for its violation — the forfeiture of the entire interest agreed to be paid, and a liability to pay back twice the amount of any such interest received.

The court, following the rule laid down in *Harris v. Runnels*, *supra*, held that the nature and amount of the penalty prescribed for the violation of the act showed that congress did not intend to render void the whole contract upon which the usurious interest had been received or taken, and that as to the principal of the debt it was valid. The second cause arose under a clause in the charter of the defendant, which “authorized it to loan the money deposited with her at any rate of interest not exceeding eight per centum per annum.”

A greater sum than this having been received upon a loan, it became a question what was the effect of this violation of the law. The argument for the plaintiff was, that the charter of the defendant not having authorized the making of such a loan, it was *ultra vires* and void. The court held that only so much of the interest as was in excess of the rate authorized was illegal and void. The question of usury was not made, and the court held the transaction valid so far as it was authorized by the charter.

The creditor also makes the point upon the facts that the payment of the \$20, although contrary to the act, was no part of the original loan, and therefore cannot affect it one way or the other. Upon the testimony my mind inclines to the conclusion reached by the register, that the payment of the \$20 was demanded and made while the transaction was yet incomplete. True, the money and the note therefor had literally changed hands, but barely so. Neither, at least the note, had been formally accepted, and I feel quite certain that if the bankrupt had not responded to the creditor's demand for something more, the latter would not be here to-day asking the allowance of this claim. But the point is not material. It is admitted on all hands that the \$20 was paid the creditor on account of the loan — for the accommodation.

§ 542. *Construction of statutes. Oregon usury law (Code, section 755). It is not necessary that the usury should be received at the time of the contract to avoid it.*

Section 2 of the act is explicit and comprehensive upon this point. “No person shall directly or indirectly receive . . . any greater sum or value for the loan or use of money than in this act prescribed.” Nothing could be plainer than this. It is not necessary that this “greater sum or value” should be contracted for or received at the time of making the loan. If it is received at any time for or on account of such loan or use of the money lent, the case is within the prohibition of the act, and the whole contract or transaction becomes illegal and void.

I do not mean to be understood as holding that a borrower may not manifest his gratitude for a loan by a free gift to the lender of either money or goods, over and above the lawful interest. The sum so given is not, in fact or contemplation of the act, either paid or received as a consideration for the use or loan of the money. But whether such money passes between the parties as a gift or consideration for the loan, in pursuance of an understanding of the parties, is a question of fact in each particular case. 3 Par. Con., 114.

It seems to me that whenever the money is received by the lender while the debt remains unpaid and the relation of creditor and debtor exists, there is a reasonable inference, in the absence of anything to the contrary, that it was

paid and received in consideration of the loan and is usurious. But where, as in this case, it was received within an instant from the making of the loan, if not as a part of it, and that, too, in pursuance of what amounted to a direct demand by the creditor for something more than legal interest, there is little room to doubt that the money was paid and received in consideration of the loan.

It is said in a text-book that the taking of usurious interest upon a contract for lawful interest will not conclusively imply a prior agreement to that effect, but that it is *prima facie* evidence thereof. 3 Par. Con., 114. Even under this rule the inference would be that the \$20 was paid in pursuance of an understanding of the parties at the time of making the loan, although it appears to have been paid afterward. But the statutes of the different states on the subject of interest vary materially. Under the statute of this state it is quite clear that unlawful interest received upon a lawful loan, in pursuance of a contract or understanding of the parties, though subsequent in point of time to the making of the loan, makes the debt usurious and the original contract illegal and void.

The general intent to strike at the root of the evil intended to be remedied is more manifest in section 3, which provides that if in a suit upon any contract it shall appear that even a gift of money has been made or promised to a creditor, the design of which is to obtain for debts due or to become due a rate of interest greater than that allowed by the act, the same — the contract — shall be deemed usurious and the entire debt forfeited.

Another point made for the creditor is, that this court cannot or will not enforce a forfeiture given by the laws of this state to the school districts of this county, and therefore it cannot take cognizance of the alleged illegality of this transaction. For this position counsel cites *Shearman v. Gasset*, 4 Gilm., 525. I think the law of this case very questionable. The court was evidently influenced by the idea that the transaction was not oppressive, according to its notions of right, rather than the rule prescribed by the law-making power.

But, be that as it may, I am unable to perceive the relevancy or force of the objection. This is not a suit or proceeding to enforce a forfeiture, but an objection to the allowance of a claim against a bankrupt's estate because the same is illegal. The transaction being illegal and void by the *lex loci*, is illegal and void everywhere and in all courts.

§ 543. *Jurisdiction of a bankrupt court as to contracts tainted with usury.*

Because this court may not have jurisdiction to enforce all the penalties consequent upon this illegal transaction by the laws of the state, it by no means follows that it cannot inquire into its legality when the question arises in a proceeding duly before it. This court has express jurisdiction to allow or disallow claims against the estate of a bankrupt, and in so doing must determine their legality. According to the law of this state this claim is illegal and must therefore be rejected.

DILL v. ELLICOTT.

(Circuit Court for Maryland: Taney, 233-242. 1854.)

Opinion by TANNEY, C. J.

STATEMENT OF FACTS.— This action is brought by the indorsee of a bill of exchange, drawn upon the defendants, and accepted by them, for \$1,000. The

defendants pleaded that the bill was given to secure the payment of money loaned by the plaintiff to the payee of the bill, upon which an interest exceeding six per cent. was reserved; and that such contract was usurious, and the plaintiff not entitled to maintain an action upon it. To this plea the plaintiff has demurred; and the question submitted to the court on these pleadings is whether, under the constitution of Maryland, adopted in 1851, an action can be maintained upon a contract for the loan of money, where an interest of more than six per cent. is reserved or received.

The clause of the constitution is in the following words: "That the rate of interest in this state shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury." This provision is contained in article 3, section 49, under the head of "legislative department." And by the third article of the declaration of rights, all acts of assembly in force on the first Monday in November, 1850, which had not expired at the adoption of the constitution, and were not altered by it, were continued in force, subject, nevertheless, to the revision of, and amendment and repeal by, the legislature of the state.

The acts of assembly, material to this question, which were passed previously to the adoption of the constitution, were those of 1704 and 1845. The first section of the act of 1704 declared that no person should exact or take above the rate of six per cent. per annum, upon the loan of any moneys, goods or merchandise or other commodities, to be paid in money; the second section declares that all contracts, by which a higher rate of interest was received, should be void; and the third section inflicted penalties for taking or receiving more than the rate of interest limited by that act. The provisions of this law were materially changed by the act of 1845; by that act the lender was entitled to recover the amount actually loaned with six per cent. interest upon it, although the contract was usurious, and stipulated for a higher interest, and it repealed altogether the third section of the act of 1704.

The act of 1845 was still in force when the constitution was adopted, and the point in issue between the parties, upon the demurrer, is whether the provisions of this act are inconsistent with the clause of the constitution before recited, and therefore repealed by it. In determining this question, the wisdom or policy of usury laws is not a subject for the consideration of the court; that was a question for the people of Maryland when they adopted the constitution. It is the duty of the court to carry into effect the provisions of that instrument, according to its true intent, to be gathered from its own words; and referring to the previous legislation of the state only so far as it may contribute to illustrate the meaning of doubtful or ambiguous language, if any such be found in the constitution, and to ascertain what previous acts of assembly are still in force.

§ 544. *Under the constitution of Maryland, article 3, section 49, a contract for more than six per cent. interest is void for the whole amount, and cannot be enforced.*

It would be difficult, we think, to raise a doubt as to the meaning of the prohibitory part of the section of which we are speaking. It declares "that the rate of interest shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded." These words are free from all ambiguity; they prohibit, in plain, positive and direct terms, the taking or demanding of more than six per cent. interest, and on this point it refers nothing to future

legislation. The constitution itself makes the prohibition, and all future legislation must be subordinate and conformable to this provision. Whoever takes or demands more than six per cent. while this constitution is in force does an unlawful act, an act forbidden by the constitution of the state. Nor do the words which follow qualify or restrain, in any degree, the meaning of the words above quoted; they declare that "the legislature shall provide by law all necessary forfeitures and penalties against usury." Now, usury consists in taking an interest for money above that allowed by law; the taking of more than six per cent. is therefore usury, and the words last quoted treat it as an offense and direct the legislature to punish it with penalties and forfeitures. The words do not merely give the power to punish, they are mandatory, and make it the duty of the legislature to punish disobedience to that provision, by forfeitures and penalties. Certainly, if the taking or demanding of more than six per cent. was not intended to be absolutely prohibited by the preceding part of the section, there would be no propriety in commanding it to be punished.

The words last quoted, therefore, do not qualify or restrict the meaning of the preceding words; on the contrary, they show that the framers of the constitution, after fixing the amount of interest which a party might lawfully take or demand, proceeded to make that provision more effectual by requiring the legislature to enforce it, and to inflict forfeitures and penalties upon any one who should thereafter take or demand an amount of interest exceeding that prescribed by the constitution.

§ 545. *A contract to do an act forbidden by law is void.*

This being the evident meaning of the language of this section, can a contract by which a higher interest is taken or demanded be enforced in a court of justice? It is true the constitution does not say, in express terms, that such a contract shall be void, nor was such a provision necessary to invalidate it, for it is well settled by a multitude of decisions, in this country and in England, that a contract to do an act forbidden by law is void and cannot be enforced in a court of justice—we do not stop at present to refer to judicial decisions to support this proposition; many cases to that effect are cited in the opinion delivered by the supreme court of the United States, in *The Bank of the United States v. Owens*, 2 Pet., 527 (§§ 449–51, *supra*), and we are not aware of any decisions, in any court, in which a contrary doctrine has been held. Indeed, in a state where the legislative, executive and judicial departments are separated, it would render all law uncertain and ineffectual, if the judicial power enforced, in whole or in part, the performance of a contract to do an act which is altogether forbidden to be done by the constitution or laws of the state. And as the constitution has forbidden the taking or demanding of more than six per cent., no contract made in this state can be enforced where a higher rate of interest is taken or demanded by the contract.

This view of the subject is fully supported by the decision of the supreme court, in the case of *The Bank of the United States v. Owens*, hereinbefore referred to. The charter of the bank contained a provision in the following words: "It (the bank) shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per cent. per annum for or upon its loans or discounts." And in an action brought by the bank upon a promissory note the defendant pleaded that it was discounted upon an agreement to pay the bank a higher rate of interest than six per cent.; to this plea the bank demurred, thus bringing the question before the court in the



same mode of pleading adopted by the counsel in this case; and Mr. Sergeant, who argued the case for the bank, contended (as the counsel for the plaintiff have done here) that a mere prohibition to take more than six per cent. did not avoid a contract to take more; and that when an agreement is avoided, it is always in consequence of an express provision by law to that effect. 2 Pet., 531. But the court held otherwise; and the language of the supreme court in deciding that question is so appropriate and directly applicable to the case before us that we give it in the words of the court. "Some doubts have been thrown out whether, as the charter speaks only of *taking*, it can apply to a case in which the interest has been only reserved, not received; but on that point the majority of the court are clearly of opinion that *reserving* must be implied in the word *taking*; since it cannot be permitted, by law, to stipulate for the reservation of that which it is not permitted to receive. 1 Hawk. P. C., 620. In those instances in which courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offense; but when the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule that it is unlawful to contract to do that which it is unlawful to do."

§ 546. *There can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal.*

After deciding this point and remarking briefly on the manner in which it came before the court they proceed to say: "To understand the gist of the question it is necessary to observe that, although the act of incorporation forbids the taking of greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all, of the acts passed in England and in the states, on the same subject, declare such contracts usurious and void. The question then is, whether such contracts are void in law upon general principles? The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the handmaid of iniquity; courts are instituted to carry into effect the laws of a country. How can they then become auxiliary to the consummation of a violation of law? To enumerate here all the instances and cases in which this reasoning has been practically applied would be to incur the imputation of vain parade; there can be no civil right where there is no legal remedy; and there can be no legal remedy for that which is itself illegal."

We forbear to quote further from the language of the supreme court; and it is sufficient to say, that after having stated the principles of law in the manner set forth in the foregoing extract from the opinion, it proceeds to refer to many adjudged cases in support of the doctrine, showing that it applied to all cases where the act was prohibited by statute, although there was nothing morally wrong in the transaction; and upon this ground decided that the bank could not maintain an action on the note, as the demurrer admitted that it had been discounted upon an agreement to take more than six per cent. interest. We do not see how the case before us can be distinguished from the one decided by the supreme court; they present precisely the same question; and the established principles of law which decided the one in favor of the defendant must decide the other in like manner.

It will be observed, also, that the opinion we have quoted points out clearly the distinction between a statute merely forbidding an act to be done, and one imposing a forfeiture or penalty for doing it; and is, in effect, an answer

to that part of the argument on the part of the plaintiff which relied on the last words in the section of the constitution, requiring the legislature to impose forfeitures and penalties against usury. The absence of any provision inflicting a penalty (say the supreme court) does not give the party a right to maintain an action on the contract if the law forbids the contract to be made; and the reason of the rule thus laid down is, that the contract being forbidden, the party can acquire no legal right under it, and consequently cannot maintain an action in a court of justice to enforce it. His incapacity to maintain an action upon it is no forfeiture or penalty, for he acquires no right under it, and therefore there is nothing to forfeit; the money he loans is not forfeited, for if he chooses to rely on the promise of the borrower, and the borrower repays him the money, he may lawfully keep it. It is not forfeited to the state, nor to any one else. But a court of justice cannot lend its aid to recover it, because the contract for the loan is one entire thing, and consequently is altogether invalid or void, and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids. The absence of any penalty, therefore, is no argument in support of this action.

§ 547. *Where the constitution of a state prescribes the rate of interest, and makes it the duty of the legislature to inflict a penalty, the courts will hold a usurious contract void though the legislature has failed to perform its duty.*

But in this case there is something more than the absence of penalties and forfeitures. It is made the duty of the legislature to inflict them; and the prohibitory clause of the constitution must be construed now in the same manner, and have the same effect, as if the legislature had performed the duty enjoined upon it. It is true, no penalty or forfeiture is incurred until the legislature shall prescribe it; but when that duty shall have been performed (be the penalty more or less), nobody, we presume, would contend that an action could still be maintained on the contract, upon payment of the penalty. The act of no future legislature can alter the meaning of the words used in the constitution; they remain the same, and must always be construed and administered in courts of justice, according to their legal import, as they stand in that instrument, whether future legislatures do or do not obey its mandates, and pass laws to enforce its provisions.

It follows from what we have said, that the first four sections of the act of 1845 are no longer in force. These sections made a usurious contract legal for the amount actually loaned, and authorized the lender to recover the amount with six per cent. interest; it made it void only so far as the usurious interest was concerned; and, as a necessary consequence of this provision, it repealed expressly the third section of the act of 1704. The act of 1845 does not, therefore, prohibit a usurious contract, but sanctions and supports it to the extent above mentioned. The constitution, on the contrary, by the prohibitory words used in it, makes the whole contract illegal, and thereby incapacitates the party from maintaining a suit upon it, for the money he actually loaned, or any part of it; and moreover, treats the taking or demanding more than six per cent. as an offense, and commands the legislature to provide forfeitures and penalties against it. The provisions of this act of assembly, and those contained in the constitution, are consequently inconsistent with each other, and the former is repealed.

In relation to the act of 1704, the plaintiff claims nothing under it; but inasmuch as the first section of that act, like the constitution, prohibits the tak-

ing of more than six per cent., and the second section contains an express provision, making void the contract where more is taken, the plaintiff contends that the omission of the second provision in the constitution proves that it was not intended to make void the contract, but to leave it as provided for and legalized in the act of 1845.

But it is evident that the second section of the act of 1704, like similar provisions in the English statutes against usury, was introduced to remove any doubt which might be raised upon the words "exact or take," and to show that the prohibition was intended to apply to contracts in which usurious interest was reserved, to be paid at a future day, as well as to cases in which it was actually exacted and taken or received at the time of the loan. It was introduced for greater caution, and to prevent nice distinctions upon the words used. This is constantly done in acts of legislation. And the omission in the constitution of a provision of this description, contained in a previous act of assembly, would hardly justify the court in inferring that it was intended to authorize an action on a contract which the constitution itself prohibited.

In expounding an instrument so solemn and deliberate as a constitution containing the fundamental law of the state, we are hardly at liberty to suppose that either those who framed it, or those who adopted it, intended to recognize or sanction the principle that an action might be maintained upon a contract to do an act which the law forbade. On the contrary, a comparison between the language of the act of 1704 and the constitution tends strongly to support the construction we have given to the latter. The prohibition in the act of assembly is to "exact or take," and the second section, as we have said, was introduced for greater caution, in order to show more clearly that, while the penalties by that law were confined to the actual receiving, the prohibition extended further, and embraced contracts in which usurious interest was reserved, although payable at a future time. But the constitution does not use the prohibitory words of the first section, but provides that no higher rate shall be "taken or demanded." Now these words clearly embrace a contract by which usurious interest is to be paid at a future day, as well as contracts in which it is taken and received. It does not mean usurious interest demanded in the negotiation previous to the loan, but demanded by the contract itself, when actually made; and if so demanded it is evidently included in the constitutional prohibition, even although the words "exacted and taken" should be regarded as confined to the actual receipt.

In an instrument like this, we are bound to presume that every word was deliberately weighed and considered before it was inserted; and with the act of 1704 before them, and about to establish, under a constitutional sanction, the principle contained in its first section, it ought not to be supposed that its words were lightly and carelessly changed, or the word "demand" substituted in the place of the word "exact," without an object. A natural and proper object would be to condense in a few words the substantial provisions spread out in the first and second sections of the act of 1704; and we think they have used words sufficient to accomplish their purpose. A comparison between the words of this act of assembly and of the constitution of 1851 tends to confirm the construction we have placed upon the latter, and which its language naturally and legally imports.

Upon the whole, the court is of opinion that the demurrer of the plaintiff to the plea of usury cannot be maintained, and judgment must be entered accordingly.

§ 548. **Contract void.**— Under the law of New York a contract for the payment of interest at a higher rate than seven per cent. is void, as are also bills of sale taken as security on such contract. *Graham v. Sheken*,\* 18 How. Pr., 322.

§ 549. A statute forbidding the taking of a greater rate of interest than a certain per cent., but which does not declare void a contract reserving a greater rate, avoids such a contract so that the courts will not enforce it at all. *Bank of United States v. Owens*, 2 Pet., 527 (§§ 449-451).

§ 550. If the charter of a bank forbids it to exact more than a certain rate of interest, and prescribes no penalty, and does not declare what effect shall be given to the usurious contract, the contract is, according to the decisions of the supreme court, void and not enforceable in a court of justice. But if the contract be executed, a court of equity will enable the borrower to recover the excess which he has paid over the legal interest. *Tiffany v. Boatman's Institution*, 18 Wall., 375 (§§ 572-79).

§ 551. If the instrument upon which the suit is brought be a security for a usurious debt, it is void by the statute, and the plaintiffs cannot recover upon it the money which they, as executors of the surety, paid in satisfaction of such usurious debt, although, when they paid it, they were ignorant of the usury; and it is not necessary that the defendant should have informed them of the usury, and instructed them not to pay it, before they paid it. *Moncure v. Dermott*,\* 5 Cr. C. C., 445.

§ 552. The act of Indiana of 1833 provides that no rate of interest exceeding ten per cent. shall be received, and that any one who shall violate this provision shall be liable to be indicted and fined. This act as construed by the state supreme court makes the usurious contract void. *Morgan v. Tipton*,\* 3 McL., 399.

§ 553. The statutes of usury of England and of the states of the Union expressly provide that usurious contracts shall be utterly void; but without such a provision they are not void as against parties who are strangers to the usury. *Fleckner v. Bank of the United States*, 8 Wheat., 338.

§ 554. **Void as to excess.**— A note given in Pennsylvania is not void because usurious. It is simply void as to the illegal excess of interest. And a note given in the District of Columbia for a part of the principal of a usurious note made in Pennsylvania is valid. *Rhawn v. Grant*,\* 1 MacArth., 81.

§ 555. Where a statute simply forbids the taking of interest in excess of a rate named, and an agreement is made to pay more, the legal rate may be recovered, but no more. *Lewis v. City of Clarendon*,\* 7 Cent. L. J., 237.

§ 556. The law in Ohio is settled that usury avoids the contract only for the excess. *McLean v. The Lafayette Bank*, 3 McL., 587.

§ 557. Money paid beyond lawful interest on account of a debt is, in legal effect, a payment upon the debt. *Loveridge v. Larned*, 7 Fed. R., 294.

§ 558. A charter granted to a bank in Missouri prohibited it from taking interest at a greater rate than one specified therein, but was silent as to penalties. *Held*, that a note at a greater rate was void only as to the excess over the specified rate, and that if the note and interest were voluntarily paid, neither the borrower nor his assignee in bankruptcy could recover more than the excess paid above the permitted rate. *Darby v. Boatman's Savings Institution*, 1 Dill., 141.

§ 559. The repeal of a usury law leaves the contract as made by the parties in full force, and no penalty or forfeiture for the usury can be imposed on the party holding the usurious contract. *Daggs v. Ewell*, 3 Woods, 344.

§ 560. **Miscellaneous.**— A national bank in Kansas having charged and received a usurious rate of interest, it was held that the assignee in bankruptcy of the borrower could recover from the bank twice the amount of the interest paid, and that he was not limited to twice the amount of the excess over legal interest. *Crocker v. First National Bank of Chetopa*, 4 Dill., 358.

§ 561. Under the statute of Massachusetts which provides that "when, in an action brought on such contract or assurance, it appears that a greater rate of interest than is allowed by law has been directly or indirectly reserved, taken or received, the defendant shall recover his full costs, and the plaintiff shall forfeit threefold the amount of the interest unlawfully reserved or taken, and no more, and shall have judgment for the balance remaining due after deducting said threefold amount," when unlawful interest is reserved on a note, and the amount is carried by renewal into other notes, the threefold amount is to be deducted in an action upon the last note. *Heath v. Griswold*, 18 Blatch., 555 (§§ 500-3).

§ 562. If a national bank discounts a note at a usurious rate of interest, paying the borrower the proceeds, less the interest, and suit be brought to recover the loan, and the borrower plead the usury, the bank will recover the face of the note, less the entire interest taken out, received or reserved, and no more. But if the note thus discounted be renewed for the same

amount, the borrower paying usurious interest out of his pocket in advance, and suit be brought on the renewed note, the defendant may recoup double the amount of the entire interest paid. But such forfeiture of double the interest is barred in two years. If, instead of paying the usurious interest at the time of the renewal, it is added to the principal, the bank will, if usury is pleaded, recover the renewal note, less interest included in it. *National Bank of Madison v. Davis*, 8 Biss., 100; 6 Cent. L. J., 106.

§ 563. Suit was brought in Louisiana upon an indebtedness for which a note was given which reserved a usurious interest. The note was not set up as the foundation of the suit, but as evidence of the indebtedness. The plaintiff claimed interest at eight per cent., a rate which might legally have been contracted for, and that rate was allowed by the court. The plea of usury not having been set up, the judgment for interest at eight per cent. was held proper, though under the laws of Louisiana no interest was recoverable on a usurious contract. *Newell v. Nixon*, 4 Wall., 572.

§ 564. The only forfeiture provided for by the thirteenth section of the act of June 8, 1864, relating to national banks, for the taking of usurious interest, is a forfeiture of all interest, notwithstanding the fact that a further penalty is provided by the laws of the state in which the transaction occurred. *Farmers', etc., National Bank v. Dearing*, 1 Otto, 29.

§ 565. A national bank extended a note, taking usurious interest therefor, and taking at the same time the indorsement of another note to itself as collateral security. Held, that the contract of indorsement was valid notwithstanding the usury, and that to declare it void would be to impose a penalty not imposed by the national banking law. *Oates v. National Bank*, 10 Otto, 239.

§ 566. Under section 30 of the national banking act, a national bank does not, by taking illegal interest, make the whole agreement void, so that a suit cannot be maintained upon it. The forfeiture of the interest is the only penalty intended, and the contract is not invalidated in other respects. *National Exchange Bank of Columbus v. Moore*, 2 Bond, 170.

## VI. RELIEF AGAINST USURY.

**SUMMARY** — *Recovery of excess paid*, § 567. — *In Missouri*, § 568. — *Rights of a stranger to the contract*, § 569. — *Plaintiff must offer to pay principal*, § 570. — *In New York; contract only voidable*, § 571.

§ 567. A borrower who has paid usurious interest can, in equity, recover no more than the excess paid above the legal rate. And his assignee in bankruptcy suing under the thirty-fifth section of the bankruptcy act of 1867, to recover payments alleged to have been made in fraud of this section, is in no better position; nor will the usurious character of the transaction enable him to recover under this section when he otherwise could not. *Tiffany v. Boatman's Institution*, §§ 572-79.

§ 568. The general statute of Missouri concerning usury forfeits the whole interest to the school fund if more than ten per cent. be agreed upon, where suit is brought upon the contract, but allows the creditor to recover the principal. If the borrower suffers judgment to go against him without pleading usury, or if, without suit, he pays the usurious interest, he cannot, either at law or in equity, maintain an action for its repayment. Whether this general law applies to and has the same effect upon a contract made by a bank in violation of a provision of its charter restricting it to eight per cent. is not decided. *Ibid.*

§ 569. It is a general rule that a stranger cannot set up usury as a defense, and the transaction can only be impeached by the borrower or those in privity with him. But the contrary rule laid down in *Lloyd v. Scott*, 4 Pet., 205 (§§ 436-40, *supra*), the latest adjudication upon the subject by the supreme-court of the United States, was followed in this case, where holders of bonds of a corporation, which were secured by mortgage, sought to enjoin a sale of the property to pay others holding bonds of the same series as collateral security for a loan to the corporation, upon the ground that such loan was usurious. *Yardley v. New York Guaranty and Indemnity Co.*, §§ 580-82.

§ 570. It is a rule in equity that affirmative relief against a usurious contract will be granted only upon condition that the plaintiff pay the defendant the amount of money advanced, or at least allow a decree therefor. This rule was applied where holders of certain of a series of bonds of a corporation, which were secured by mortgage, sought to exclude entirely from participation in the security others who held bonds of the same series as collateral security for a loan to the corporation, upon the ground that such loan was usurious, and the court held that the plaintiffs should, as a condition of the relief sought, allow the defendants to have decrees for the amount so advanced. *Ibid.*

§ 571. In New York, notwithstanding the statute declares a usurious contract absolutely void, it is in reality only voidable, and the borrower may affirm it. He may do this, if a mortgagor, by selling the mortgaged property subject to the usurious mortgage. The usurious contract may also be affirmed by appropriating property for the payment of the usurious debt, or assigning property to a trustee for that purpose. In such case the assignment is valid, and neither the assignee nor any other person can attack the secured debt for usury. The borrower may disaffirm the contract, and not only personally impeach it for usury, but may grant to another the right to do so. He may do this, if a mortgagor, by selling his entire interest in the mortgaged property, including his right to impeach the usurious transaction. A creditor who seizes the entire mortgaged property also succeeds to the right of his debtor in this regard, and may sell the property free from the usurious loan. Most of the authorities in the other states, however, hold that where a party takes subject to a usurious mortgage, he cannot impeach the security. *Ibid.*

[NOTES.— See §§ 583-612.]

TIFFANY v. BOATMAN'S INSTITUTION.

(18 Wallace, 375-391. 1873.)

APPEAL from U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.— Darby, being much embarrassed, borrowed from the Boatman's Savings Institution \$135,000, pledging a lot of county bonds as security for the loan, agreeing to pay ten per cent. interest for the loan, the charter of the institution limiting it to eight per cent. He also procured from the same source \$30,000, by discounts of his notes, indorsed by some of his friends, and in those discounts it is alleged the institution exceeded its chartered rate of interest. He went into bankruptcy, and Tiffany, his assignee, brought suit against the Boatman's Savings Institution to recover from it, as having been lent in violation of the bankrupt act, the moneys it had lent to Darby, to wit, the \$135,000 and the \$30,000, relying on section 35 of the bankrupt act. Upon the hearing in the court below it was held that the \$30,000 transaction was altogether valid, and the \$135,000 loan was unlawful only in that the interest exacted exceeded eight per cent. The assignee appealed.

§ 572. *In Missouri one who pays usurious interest cannot recover it back.*

Opinion by MR. JUSTICE DAVIS.

The general statute of Missouri concerning usury allows an individual to receive ten per cent. per annum interest for the loan of money; but, if more be taken, and suit is brought to enforce the contract, and the plea of usury be interposed, the whole interest is forfeited to the proper county for the use of schools. The debtor is not released from his obligation to pay, but the interest is diverted from the parties and appropriated for school purposes. If, however, the borrower suffers judgment to go against him without pleading usury, or if, without suit, he pays the usurious interest, he cannot, either at law or in equity, maintain an action for its repayment. This was settled in *Ransom v. Hays*, 39 Mo., 448, and affirmed in *Rutherford v. Williams*, 42 id., 35, and these decisions would be conclusive of this controversy, unless it is affected by the bankrupt law, if the legislature intended the general provisions of this act to apply to loans by artificial as well as natural persons, although the former might be restricted to a less rate of interest than the latter. It is contended by the defendant that this act was meant to apply to corporations, and that if a bank, discounting a note in the course of business, commits usury, it is subject to precisely the same consequences with an individual. On the other hand, the complainant insists that the legislature did not intend in this matter to place corporations on the same footing with natural persons, and cites in support of this position *The Bank of Louisville v. Young*, 37 Mo., 406. But

the facts of that case did not involve the construction of a contract made by a corporation created by an act of the legislature of Missouri. The point decided there was that a note given to secure a loan made in foreign bank notes by a foreign corporation doing business by an agent in St. Louis, contrary to the provisions of an act to prevent illegal banking, was void.

§ 573. *Quære: As to the effect of a contract made by a bank in violation of its charter.*

We have been referred to no case in the courts of Missouri, nor are we aware of any, in which the question has been directly presented whether the general law relating to usury applies to and has the same effect upon a contract made in violation of its charter by a bank, as upon a contract made by an individual. The question is one of great importance to the business interests of that state, and may be far-reaching in its consequences, and as it is not necessary to decide it in order to dispose of this case, in accordance with the principle on which the circuit court placed its decree we prefer to leave its decision to the state tribunals. Assuming, then, that this defendant is not within the purview of the general usury statute of the state, what are the consequences that must attach to it for taking excessive interest from Darby? The bill proceeds on the idea that the provision of the charter being violated, all the loans to Darby were *ultra vires* and void, and as they were made to him within four and six months of his adjudication as a bankrupt, with the knowledge of the defendant during the whole course of its dealing with him that he was insolvent, the complainant has, in his character of trustee, the right to recover for the use of his trust all the sums of money paid to the defendant by Darby, because paid in fraud of the bankrupt act.

§ 574. *A contract to do an act forbidden by law is void and cannot be enforced in courts of law.*

The defendant is by its charter authorized to lend money on interest, but is forbidden to exact more than eight per cent. for the loan. No penalty is prescribed for transgressing the law, nor does the charter declare what effect shall be given to the usurious contract. This effect must, therefore, be determined by the general rules of law. The modern decisions in this country are not uniform on the question whether, if the bank takes more than the rate prescribed, the contract shall be avoided or not on these general rules; nor is this a matter of surprise if we consider the growing inclination to construe statutes against usury so as not to destroy the contract. It is, however, unnecessary to review these cases, or the earlier ones in England and this country, which uniformly hold that the contract is avoided, because this court has in the case of *The Bank of the United States v. Owens*, 2 Pet., 527 (§§ 449–51, *supra*), decided the question. The bank in that case brought suit upon a promissory note that was discounted at a higher rate of interest than six per cent., which was the limit allowed by its charter upon its loans or discounts. The charter, like that of the Boatman's Institution, did not declare void any contract transcending the permitted limits, nor affix any penalty for the violation of the law. It was contended in that case, as it has been in this, that a mere prohibition to take more than a given per cent. does not avoid a contract reserving a greater rate, and that when a contract is avoided, it is always in consequence of an express provision of law to that effect. But the court held otherwise, and decided that such contracts are void in law upon general principles; "that there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is illegal." Chief Justice Taney, in the *Maryland*

circuit, as late as 1854, in a similar case, held similar views, and supported them by the decision in this case. *Dill v. Ellicott*, Taney, 233 (§§ 544-47, *supra*). It must, therefore, be accepted as the doctrine of this court, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.

§ 575. *Equity will not aid one party to an illegal contract and deny redress to the other.*

But it does not follow in cases of usury, if the contract be executed, that a court of chancery, on application of the debtor, will assist him to recover back both principal and interest. To do this would aid one party to an illegal transaction and to deny redress to the other. Courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest. Nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest. Story's Equity Jurisprudence, 1 vol., 10th edition by Redfield, §§ 300-302. In recognition of this doctrine the court below rendered a decree for the excess of interest over eight per cent. per annum exacted of Darby on the note for \$135,000, and dismissed the bill as to all other claims.

§ 576. *Where the discount of negotiable notes is only a color for usurious loans a court of equity will treat it as such.*

The six accommodation notes which the defendant alleges were purchased from note brokers were really taken on loans to Darby, and the illegal interest received above eight per cent. on them should, on the principle of that decree, be refunded, as much as that upon the larger note. It is true that usury is only predicable of an actual loan of money, and equally true that a negotiable promissory note, if a real transaction between the parties to it, can be sold in the market like any other commodity. The real test of the salability of such paper is whether the payee could sue the maker upon it when due. He could do this if it was a valid contract when made, otherwise not. Mere accommodation paper can have no effective or legal existence until it is transferred to a *bona fide* holder. It follows, then, that the discounting by a bank at a higher rate of interest than the law allows of paper of this character, made and given to the holder for the purpose of raising money upon it, in its origin only a nominal contract on which no action could be maintained by any of the parties to it if it had not been discounted, is usurious, and not defensible as a purchase. The point was decided in New York at an early day (*Munn v. Commission Co.*, 15 Johns., 55), and this decision recognized and approved by this court in *Nichols v. Fearson*, 7 Pet., 103 (§§ 530-31, *supra*), and the general current of decision is in the same direction. *Munn v. Commission Co.*, 15 Johns., 55; *Powell v. Waters*, 17 id., 176; *Wheaton v. Hillard*, 20 id., 289; *Powell v. Waters*, 8 Cowen, 669; *Corcoran v. Powers*, 6 Ohio St., 37; 3 *Parsons on Contracts*, 6th ed., p. 144, and cases cited in note S.

There are cases which hold that the purchaser of such paper is protected, if he took it in good faith of the holder, without knowledge of its origin, and in the belief that it was created in the regular course of business. 3 *Parsons on Contracts*, p. 145, and cases cited in the note on that page. Whether this limitation of the rule be correct or not it is not important to inquire, as the decision of the question under consideration does not rest upon it.

The six notes which are the basis of the transaction complained of were



executed by Darby solely for the purpose of raising money upon them, indorsed by Brotherton & Knox for his accommodation, and delivered by him to Stagg and other street brokers to be negotiated. This negotiation was effected with the Boatman's Institution, and it is perfectly manifest that the cashier, in purchasing the paper, did not suppose he was advancing the money for the benefit of the brokers who held them, or of Brotherton & Knox, who indorsed them. They were doubtless purchased because the security was deemed sufficient, but it is impossible to conceive that the cashier did not know the paper to be of that class called accommodation, as it is conceded that Brotherton & Knox were gentlemen of large pecuniary ability, and had no occasion to go upon the street to get paper held by them *bona fide*, against Darby or any one else, discounted. Indeed, Stagg says the notes were negotiated for Darby's benefit, and explains in some instances how it was done. Darby would apply to him for money on his paper, and he would go to the Boatman's Institution to see if the cashier would take it, and if the reply was in the affirmative the paper would be made, taken to the bank, and the money obtained on it. Can any rational person suppose, in the absence of any direct evidence, that the cashier in dealing with Stagg thought he was dealing with the owner of the notes? The presumption is that street brokers act for others, not themselves, and that the cashier was well acquainted with this course of business. If so, he knew, or ought to have known, that Darby wanted the money, and that the paper was made to enable him to get it, and for no other purpose. This being the case, the transaction can be viewed in no other light than as a loan of money directly to Darby, and as he paid more than eight per cent. for its use, the circuit court erred in not ordering the excess to be refunded.

§ 577. *In what respects the powers of the assignee in bankruptcy exceed those of the bankrupt himself.*

The remaining question to be considered is whether in this case the rights of the trustee are greater than those of Darby. It is certainly true, in very many cases, he can do what the bankrupt could not, because he represents the creditors of the insolvent. If, for instance, the bankrupt should create a trust which was designed to conceal his property from creditors, although equity would not lend its aid to him to enforce the trust, it would to his assignee for the benefit of creditors. *Carr v. Hilton*, 1 Curt., 235. And many other examples might be cited in illustration of the rule, but it would be a waste of labor to do so. The point is whether, under the facts of this case, the bill will lie to recover back both principal and interest paid on the loans by Darby, when, as we have seen, if he had not been declared a bankrupt and had filed it in his own behalf he could have only recovered the excess of interest paid beyond the charter rate.

§ 578. *It is not a preference of creditors, in the view of the bankrupt law, to give security when the debt is contracted.*

It is very clear if the loans in controversy had been made at legal rates, and were not fraudulent in fact, they could not be impeached. There is nothing in the bankrupt law which interdicts the lending of money to a man in Darby's condition if the purpose be honest and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent if the loan was made in good faith, without any intent to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value

to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable, for every one is interested that his business should be preserved. In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor policy of the bankrupt act are violated if these collaterals be taken *at the time* the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which it is one of the great objects of the bankrupt law to prevent. The preference at which this law is directed can only arise in case of an antecedent debt. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the creditor had good reason to believe the debtor to be insolvent. But the giving securities *when* the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect. *Hilliard on Bankruptcy*, ch. 10, p. 333, § 10; *Hutton v. Cruttwell*, 1 Ell. & Bl., 15; *Bittlestone v. Cooke*, 6 id., 296; *Harris v. Rickett*, 4 Hurls. & N., 1; *Bell v. Simpson*, 2 id., 410; *Lee v. Hart*, 34 Eng. L. & Eq., 569; *Hunt v. Mortimer*, 10 Barn. & Cress., 44; *Ex parte Shouse, Crabbe*, 482; *Wadsworth v. Tyler*, 2 Bank. Reg., 101. Testing this case by this rule, there is no difficulty about it on the theory that the loans were not made in excess of lawful interest.

There is nothing to invalidate the jail-bond transaction. If it was unwise in Darby to purchase these bonds the defendant did not not advise it, and is not, therefore, chargeable with the fictitious credit which, it is alleged, he obtained by reason of the purchase. So far as the evidence shows the purchase was accomplished before the defendant knew of it. It is a fair inference of fact that the National Bank of Missouri was tired of carrying the loan which Darby made of it in order to buy the bonds, and that the effect of the loan from this defendant was to prevent their sacrifice. At any rate the creditors of Darby were not harmed by the transaction, for the bonds when sold realized more than they cost; nor was any wrong intended by Darby. The money was not borrowed to conceal it from creditors, but to take valuable securities out of pledge. This Darby had the right to do, and the defendant in helping him to do it was guilty of no fraud on creditors, nor was any contemplated. On the contrary, so far as we can see, the creditors were benefited by the substitution of the Boatman's Institution for the National Bank of Missouri. At all events Darby's estate was in no wise impaired by the transaction. The securities were valid in the hands of the defendant, and Darby could lawfully apply the proceeds arising from their sale to repay the advances made by it.

If the six accommodation notes had been discounted at legal rates the loan

would have been equally unimpeachable. Conceding that the bank had good reason to believe Darby to be insolvent, the proceeding, as we have seen, was not necessarily fraudulent as a matter of law, and there is nothing in the evidence to show that it was fraudulent in fact. The loans were not made to defeat creditors or delay them, or to conceal property from them, nor was such their effect. The paper on which they were based was taken as other paper with good indorsers is taken in the regular course of business. There is no evidence that the money was used improperly, or that the bank supposed it would be. Darby doubtless raised the money hoping to be able to go on with his business; not to defeat his creditors, but to pay them.

If it were clear at the time to his mind that he could overcome his difficulties (as we think it was), notwithstanding the real state of his affairs did not justify the belief, his conduct was not in fact fraudulent, nor is it condemned by any provision of the bankrupt law.

§ 579. *The rule upon which courts of equity act in cases of usury is that the money borrowed shall be paid back with legal interest.*

Does the fact, then, that the interest reserved on the notes in controversy exceeded the charter rate, change these transactions, which were lawful if not tainted with usury, so that the trustee can recover back the whole sum; when, as we have seen, Darby, if suing personally, could only recover the excess? We think not. The trustee in this matter has no larger interest than the bankrupt. The estate of Darby is diminished by reason of his dealings with this defendant, to no greater extent than the usurious interest which he has paid. This the trustee should obtain as proper assets to be administered, but to allow him to get what he asks would be to transfer to the creditors of Darby a sum of money exceeding \$150,000, which he never owned, by way of punishment of the bank for taking excessive interest. A court of equity does not deal with contracts affected with usury in this way. The relief it gives is always based on the idea that the money borrowed with legal interest shall be paid. 1 Story's Equity, §§ 301, 302.

We have not considered the point raised about the exclusion of evidence, because at the most, the evidence, if admitted, would only have been cumulative on the subject of Darby's insolvency and the defendant's knowledge; and we have treated the case on the theory that the officers of the institution knew, when they made the loans and received payment of them, that Darby was insolvent.

The case will have to go back for the purpose of enabling the circuit court to ascertain in some proper way the excess of interest over the charter rate paid on the six accommodation notes, and to enlarge the decree so as to cover that sum. In all other respects the disposition of this case by the circuit court was correct. Decree reversed, and the cause remanded with directions to proceed in conformity with this opinion.

#### YARDLEY v. NEW YORK GUARANTY AND INDEMNITY COMPANY.

(Circuit Court for Tennessee: 1 Flippin, 551-558. 1876.)

STATEMENT OF FACTS.—The original bill charged that defendant, the New York Guaranty and Indemnity Company, held a large number of bonds of the Memphis Water Company as collateral for a loan made at a rate of seven per cent. interest, but with ten per cent. per annum usury, disguised under the name of commissions. The bill prayed for an injunction to restrain the

Guaranty Company from enforcing the mortgage by which the loans were secured. This bill was filed by Yardley, a creditor of the Water Company. There were answers filed and cross-bills, a sale was made and set aside, and other proceedings had which are immaterial to this issue. The Gaylord Iron and Pipe Company filed an answer and cross-bill setting up the usury by the Guaranty Company, and upon the demurrer of this company to the cross-bill the case was heard.

§ 580. *A stranger cannot set up usury as a defense. It is confined to the borrower and his privies.*

Opinion by BROWN, J

While the general rule is recognized by all the authorities that a stranger cannot set up usury as a defense, and that the transaction can only be impeached by the borrower or those in privity with him, the application of this doctrine has occasioned a vast amount of litigation, and the authorities are far from harmonious. These questions of privity have arisen most frequently in the state of New York, where the penalty for usury is most severe, and usurious loans most frequent. The following rules are deduced from the authorities of that state:

1st. That, notwithstanding the statute declares the usurious contract absolutely void, it is in reality only voidable, and the borrower may affirm it.

(a) He may do this, if a mortgagor, by selling the mortgage property subject to the usurious mortgage. *Sands v. Church*, 6 N. Y., 647; *Chamberlain v. Dempsey*, 36 N. Y., 144; *Mechanics' Bank v. Edwards*, 1 Barb., 271; *Post v. The Bank of Utica*, 7 Hill, 406; *Hartley v. Harrison*, 24 N. Y., 170.

(b) By appropriating property for the payment of a usurious debt, or assigning property to a trustee for that purpose. In such case the assignment is valid, and neither the assignee nor other person can attack the secured debt for usury. *Murray v. Judson*, 9 N. Y., 73; *Greene v. Morse*, 4 Barb., 332; *French v. Shotwell*, 5 Johns. Ch., 555; *Same Case*, 20 Johns., 668; *Den v. Dodds*, 1 Johns. Cas., 158.

2d. The borrower may disaffirm the contract, and not only personally impeach it for usury, but may grant to another the right to do so. He may do this:

(a) If a mortgagor, by selling his entire interest in the mortgaged property, including his right to impeach the usurious transaction. *Schufeldt v. Schufeldt*, 9 Paige, 137; *Brooks v. Avery*, 4 N. Y., 225.

(b) A creditor who seizes the entire mortgaged property on execution also succeeds to the right of his debtor in this regard, and may sell the property free from the usurious loan. *Mason v. Lord*, 40 N. Y., 476; *Post v. Dart*, 8 Paige, 639; *Dix v. Van Wyck*, 2 Hill, 528; *Jackson v. Tuttle*, 9 Cow., 233; *Cardon v. Kelly*, 59 Barb., 239; *Thompson v. Van Vechten*, 27 N. Y., 568; *Schroepfel v. Corning*, 5 Denio, 236. The authorities in other states are not entirely harmonious; most of them, however, hold that where a party takes subject to a usurious mortgage he cannot impeach the security. *Green v. Kemp*, 13 Mass., 575; *Reading v. Weston*, 7 Conn., 409; *Loomis v. Eaton*, 32 Conn., 550; *Backus v. Calhoun*, 45 Ala., 582; *Fielder v. Varner*, id., 429; *Stephens v. Muir*, 8 Ind., 352; *Henderson v. Bellew*, 45 Ill., 322; *Huston v. Stringham*, 21 Ia., 36; *F. & M. Bank v. Kimmel*, 1 Mich., 84.

§ 581. *The rule usually received as to usury, held erroneous by the supreme court of the United States. Cases cited.*

Unfortunately the only two decisions of the supreme court of the United

States are in direct conflict upon this point. The first is that of *De Wolf v. Johnson*, 10 Wheat., 367 (§§ 460–67, *supra*). This was a bill to foreclose a mortgage which the assignee of the equity of redemption attempted to defeat by proof of usury between the mortgagor and mortgagee. The terms of sale of the property were expressly subject “to the incumbrances of my previous mortgage or deed of trust, particularly a mortgage deed to De Wolf from Prentis, dated,” etc. In disposing of the case the court observed: “Again it is perfectly established that the plea of usury, at least as far as to landed security, is personal and peculiar; and however a third person having an interest in the land may be affected, incidentally, by a usurious contract, he cannot take advantage of the usury.” Here, then, the case presents a third person, the assignee of an equity of redemption, setting up a defense which, in one aspect, Prentis himself cannot set up; but, on the contrary, instead of pleading must be supposed to have refused to set up, or have abandoned.” . . . “But had they purchased from Prentis in the most absolute and general manner, and altogether without notice, actual or constructive, they still could have acquired no more than an equity of redemption, and that would not have transferred to them the right of availing themselves of the plea of usury. It would indeed be astonishing were it otherwise, for the contrary rule would hold out no relief to the borrower; it would only be transferring his money from the pocket of the lender to the pocket of the holder of the equity of redemption.”

The case of *Lloyd v. Scott*, 4 Pet., 205 (§§ 436–40, *supra*), involves the same principle. One Scholfield, the owner of certain real estate in Alexandria, in consideration of \$5,000, granted to one Moore, his heirs and assigns forever, an annuity of \$500 payable in half-yearly instalments, with power to distrain for non-payment. Scholfield subsequently conveyed to the plaintiff, Lloyd, the property in question, subject to this charge. Upon distress afterwards made for rent, Lloyd brought replevin, claiming the annuity or rent charge was a mere device to cover a usurious loan. The court held that he could defend upon this ground, and disposed of the case of *De Wolf v. Johnson* by saying that “the question whether the purchaser of an equity of redemption can show usury in the mortgage to defeat a foreclosure was not involved in the case.” It is true that the case was disposed of upon two grounds, one of which was the contract was not in fact usurious, and the other that the defendant could not take advantage of usury if any had existed; but there is nothing to indicate it was not decided as much upon one ground as the other.

This opinion in *Lloyd v. Scott*, though contrary to a great weight of authority and of the prior decision of the court which announced it, I am bound to respect as the later adjudication of the court, and it apparently strikes at the root of the general rule stated in the opening of this opinion, that the defense of usury is personal to the borrower. I think the principle there announced covers the case under consideration. It is true, as argued by the defendants, that the plaintiff, and every purchaser of bonds, acquired the bonds they hold with the understanding and upon the condition that the deed of trust securing them secured alike the whole issue of six hundred bonds, and that the contract between all the parties was, that each of the bonds was secured by one six-hundredth part of the property conveyed; at the same time, every purchaser of these bonds had a right to assume that they were negotiated at a legal rate of interest, and were interested in their realizing for the company as much as possible. Every dollar received by the company from the sale of these bonds

and subsequently put upon the water works added to the security of every other bondholder. If bonds were sold at but fifty cents on the dollar, but half the money would be realized that there would have been had the bonds been sold at par. By one-half the amount of these bonds, therefore, the security of each bondholder would be lessened.

§ 582. *The rule in equity is that affirmative relief against a usurious contract will be granted only upon condition that the plaintiff pay the defendant the amount of money advanced, or allow a decree therefor.*

But there is a defect in the case made by the cross-bill, which seems to me fatal to the relief sought. The parties to these suits are contestants for priority of payment. The cross-bill sets forth the usury in the contracts under which the defendants held these bonds; prays that the trustees named in the mortgage may be enjoined from selling the property, and that the bonds issued to the defendants may be surrendered and canceled. The rule in equity is well established that affirmative relief against a usurious contract will be granted only upon condition that the plaintiff pay the defendant the amount of money advanced or at least allow a decree therefor. This rule has been repeatedly recognized by the supreme court of the United States. See *Brown v. Swan*, 10 Pet., 497; *Tiffany v. Boatmen's Institution*, 18 Wall., 385 (§§ 572-79, *supra*).

In the case of *Spain v. Hamilton*, 1 Wall., 604 (ASSIGNMENT, §§ 8-12), it was held that the complainant who was contesting his claim to priority upon a fund in the treasury could only have relief for the excess over the real debt. I see no reason why that rule is not applicable here. While it would not be necessary for the complainant in a bill of this kind to offer to pay the defendants the amount of money advanced to them with legal interest, I think they should consent as a condition of the relief sought that the defendants have decrees for the amount so advanced. This, however, was evidently not the purpose of this bill. It seeks no less than the entire cancellation of the bonds held by the defendants, and the entire exclusion of their claim from the fund to be realized from the sale of the property.

Without undertaking to decide whether a bill might not be filed after the sale of the property, praying for a reduction of this claim to the amount actually advanced with legal interest; or whether this bill may not be amended so as to accomplish, practically, the same purpose, it seems to me that in its present shape the case made by the cross-bill of complainant cannot be sustained. The demurrer to the cross-bill must therefore be sustained.

§ 583. *Offer to pay principal is necessary.*—A law of New York that the borrower under a usurious contract may in equity obtain a cancellation of his obligation and securities therefor in a court of equity without offering to repay the sum borrowed will not be enforced by a court of equity in another state although the contract was made in New York. *Matthews v. Warner*, 6 Fed. R., 461.

§ 584. One who seeks relief in equity on the plea of usury must offer to repay the sum actually lent. *Ibid.*

§ 585. *Must pay legal interest.*—A mortgagor who seeks relief in equity against a contract entered into as a cover to secure usurious interest on the mortgage, which specified no rate of interest, will be compelled to pay legal interest as a condition of relief. *Gordon v. Hobart*, 2 Story, 243.

§ 586. Where assignees of a usurious note for which a judgment and mortgage had been substituted sued in equity to enforce the mortgage, it was held that although the contract was void the defendants setting up the usury must pay the note with lawful interest as a condition of the relief asked by them, and especially as it would prevent circuity of action. *Morgan v. Tipton*, \* 3 McL., 339.

§ 587. A person pleading usury in a court of equity must come in with clean hands. He must bring in the money actually advanced with interest or show his readiness and ability to refund it. *Bowen v. Kendall*,\* 23 Law Rep., 538.

§ 588. He who seeks the aid of a court of equity to be relieved from usury must do equity by offering to pay the principal and legal interest upon the money borrowed. This is essential to give the court jurisdiction, and to enable the chancellor, if he thinks proper, to require the payment of the principal and interest before hearing the cause. If the complainant does not comply with this rule, he can have no standing in a court of equity. It was so held where the borrower sought a discovery of the usury and an injunction to prevent a sale of property mortgaged to secure the loan. *Stanley v. Gadsby*,\* 10 Pet., 521.

§ 589. A person setting up usury can obtain relief in equity only for the usurious excess, and this rule is not varied by the fact that he is a party to a bill brought to test the priority of the parties to payment from a certain fund. *Spain v. Hamilton*, 1 Wall., 604.

§ 590. It is not sufficient for an administrator seeking relief from usury in equity to aver his willingness to pay the principal when the affairs of the intestate will admit of it. *Brown v. Swann*,\* 10 Pet., 497.

§ 591. Money paid upon a usurious contract cannot be recovered back beyond the amount of the usury paid. *De Wolf v. Johnson*, 10 Wheat., 357 (§§ 460-67).

§ 592. Where a bank, whose charter prohibited, without prescribing any penalty, the taking of greater than a specified rate of interest, loaned money at a greater rate than that prescribed, and received it back with the full interest contracted for, it was held that equity had jurisdiction of a bill to recover back the illegal interest, but that nothing more than the excess paid above the charter rate could be recovered back. *Darby v. Boatman's Saving Institution*, 1 Dill., 141.

§ 593. Under the code of Georgia an action on an open account is applicable to the recovery of money paid by way of usury. *Indebitatus assumpsit* for money had and received is the proper form of action under the common law system of pleading, and where that action would formerly lie, the action for open account will generally lie under the code. *Whitaker v. Pope*,\* 2 Woods, 463.

§ 594. In a petition to recover money paid as usury, a bill of particulars setting forth the usurious payments as general indebtedness for cash paid by the plaintiff to the defendant is sufficient. *Ibid.*

§ 595. Where usurious interest is paid by a borrower he may recover of the lender the sum paid in excess of the legal interest. *Thomas v. Watson*, Taney, 297.

§ 596. Under the laws of Vermont usurious interest paid by a debtor may be recovered. The debtor's right is a vested and not merely an inchoate one depending on suit, and as such vests in his assignee in bankruptcy. *Moore v. Jones*,\* 23 Vt., 739.

§ 597. An agreement to pay illegal interest cannot be enforced, but if such interest is actually paid, repayment will not be decreed. *Longworth v. Taylor*, 1 McL., 514.

§ 598. Usury as a defense must be specially pleaded to entitle it to be considered. *Confederate Note Case*, 19 Wall., 548.

§ 599. Usury must be specially pleaded and the evidence must sustain the plea. *Cleveland Ins. Co. v. Reed*, 1 Biss., 180; 6 Am. L. Reg., 406.

§ 600. Discovery.—The third section of the Virginia statute of usury of November 23, 1796, declares that "any borrower of money or goods may exhibit a bill in chancery against the lender, and compel him to discover, upon oath, the money or thing really lent, and all contracts, bargains or shifts which shall have passed between them relative to such loan, or the repayment thereof, and the interest and consideration for the same; and if thereupon it shall appear that more than lawful interest was received, the lender shall be obliged to accept his principal money without interest or consideration, and pay costs, but shall be discharged of all other penalties of this act." It having been decided by the court of appeals of Virginia that under this act every debtor had a right to go into equity whether he could or could not prove the usury without the aid of the defendant's answer, upon the authority of this, it was held in this case that equity had jurisdiction when a suit at law had been instituted upon a usurious contract, and the parties had agreed to let judgment be entered for the amount claimed and allow the debtor the privilege of resorting to a court of equity to have the claim settled upon the same principles as if he had instituted a bill in chancery for discovery of the usury. [Reversed in 10 Pet., 497.] *Swann v. Brown*,\* 4 Cr. C. C., 247.

§ 601. The third section of the statute of usury of Virginia provides that "any borrower of money or goods may exhibit a bill in chancery against the lenders, and compel them to discover on oath the money they really lent, and all bargains, contracts or shifts which shall have passed between them relative to such loan, or the repayment thereof, and the interest and consideration for the same; and if thereupon it shall appear that more than lawful interest was reserved, the lender shall be obliged to accept his principal money without interest or considera-

tion, and pay costs, but shall be discharged of all the other penalties of this act." This statute should be so construed as to give the benefit of it to the borrower only in those cases in which the complainant seeking for a discovery avers that he is unable to prove the facts by other testimony. The bill should not be retained after the answer denies the matter sought. The statute should receive a strict construction as to the relief intended to be given by it to the borrower, because it is not a law in furtherance of strict justice between the borrower and lender. *Brown v. Swann*,\* 10 Pet., 497.

§ 602. In the absence of accident, mistake, fraud or surprise a defendant sued at law on a usurious contract will not be entitled to a bill of discovery, if he suffers a verdict and judgment to be taken against him, especially when he does so without making a defense at law. *Ibid*.

§ 603. In bankruptcy.—The bankrupt act does not confer upon the assignee in bankruptcy power to institute proceedings for the forfeiture of a mortgage for usury under the local statutes, not claimed by the bankrupt either before or after the proceedings against him in bankruptcy. *Bromley v. Smith*, 2 Biss., 511.

§ 604. Where, if bankruptcy had not supervened, the bankrupts could have recovered of a bank, under the national banking act (R. S., § 5191), for usurious interest paid, the assignee in bankruptcy, being their "legal representative" within the meaning of the act, may sue and recover in like manner. *Crocker v. Nat. Bank of Chetopa*, 4 Dill., 358.

§ 605. The assignee in bankruptcy of one of two mortgagors cannot maintain an action to avoid the mortgage for usury, under the statute in Wisconsin avoiding securities for usury, without tendering the money borrowed. He is not a borrower and entitled to that privilege within the meaning of the act. *Bromley v. Smith*, 2 Biss., 511.

§ 606. Whenever the parties to a usurious loan are obliged to resort to a court of equity for relief for the foreclosure of securities, or for their redemption, they are forced to submit to an equitable adjustment of the debt, which is held to be the payment of the loan with interest. And without deciding whether an assignee in bankruptcy is bound to set up usury as a defense to a claim made against the estate for the purpose of avoiding what is in other respects a valid claim, he cannot give up the benefit of these equitable principles. *In re Hoole*, 3 Fed. R., 496.

§ 607. A creditor seeking to prove his claim against the estate of a bankrupt stands in the same position to his claim as if enforcing it by suit in court, and the assignee may set up usury as a defense if it could have been set up by the debtor if bankruptcy had not intervened. *In re Prescott*, 5 Biss., 523.

§ 608. The bankruptcy court has jurisdiction to allow or disallow claims against the estate of a bankrupt, and in so doing must determine their legality. The court will therefore reject a claim on account of usury, if such renders it illegal under the state law, and this although it has no jurisdiction to enforce all the penalties consequent upon the illegal transaction by the laws of the state. *In re Pittock*, 2 Saw., 416 (§§ 540-43).

§ 609. A mortgage creditor, after exhausting his security, proved the balance against the estate of the debtor in bankruptcy. The note which constituted the debt being usurious, the assignee in bankruptcy recovered of the creditor the statutory penalty. *Held*, that the judgment for such penalty cannot be set off against the claim of the creditor against the bankrupt's estate. *Wilson v. National Bank of Rolla*, 1 McC., 538.

§ 610. Miscellaneous.—Under the laws of Illinois the reservation of usurious interest does not render the contract void, and after the time for bringing an action to recover the usurious interest has expired no advantage can be taken of the usury. *Hansbrough v. Peck*, 5 Wall., 497.

§ 611. Under the laws of Maryland, where a judgment has been rendered on a usurious contract, its collection, so far as the excess above legal interest is concerned, will be enjoined, and such injunction can be procured as well by the trustee of the insolvent judgment as by the debtor himself. *Thomas v. Watson*, Taney, 297.

§ 612. Under the laws of Louisiana usurious interest cannot be reclaimed, nor can it be imputed to the principal unless a suit for the recovery is begun or the plea of usury set up within three months after judgment is made. *Cook v. Lillio*, 18 Otto, 792.

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## INTERNAL REVENUE.

See REVENUE. As to Criminal Prosecutions, see CRIMES. See, also, COURTS, V, 5.

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## INTERNATIONAL LAW.

See CONSTITUTION AND LAWS; TREATIES; WAR.



## INTERPLEADER.

See PRACTICE.

## INTERVENTION.

See PRACTICE.

## INVENTIONS.

See PATENTS.

## INVOICE.

See CARRIERS; REVENUE; SALES.

## IOWA.

See STATES.

## IOWA LAND TITLES.

See LANDS.

## ISLANDS.

§ 1. Jurisdiction extends to the middle of the channel at low water between two islands belonging to different nations. *An Open Boat and Cargo*, 1 Ware, 26.

§ 2. The island called Pope's Folly, in the Bay of Passamaquoddy, is within the jurisdiction of the United States, notwithstanding the decision of the commissioners under the fourth article of the treaty of Ghent, to the effect that "Moose Island, Dudley Island, and Frederick Island do, and each of them does, belong to the United States, and that all the other islands and each and every of them in the Bay of Passamaquoddy do belong to his Britannic Majesty." *Ibid.*

§ 3. The conveyance to congress by Virginia of all her right to the territory "situate, lying and being to the northwest of the river Ohio," conveyed a peninsula or island on the western or northwestern shore of that river, which is separated from the Indiana mainland by a channel or bayou, through which the waters of the river sometimes flow, but never at low water. So held, in ejectment brought to recover land in the island, claimed under grant from the state of Kentucky, against parties holding under grant from the United States, as being part of Indiana. *Handly v. Anthony*, 5 Wheat., 374.

§ 4. Conquered territory.—An island conquered by the enemy, for every belligerent and commercial purpose, is to be considered as a part of the domain of the conquerer, so long as he retains the possession and government of it; and the proprietor of land in such island, although neutral, so far as respects his interest in such land, partakes of its character, and the produce, while the owner remains unchanged, is subject to the same disabilities. Thus the island of Santa Cruz, belonging to Denmark, was subdued during the war of 1812 by British arms. B., an officer of the Danish government, and a proprietor of land therein, left the island, on its surrender, for Denmark. He still retained his estate in the island under the management of an agent, who shipped some sugar from the estate, on board a British ship, to London, on account and risk of B. The ship was captured by an American privateer, and both

ship and cargo libeled and condemned. *Held*, that B.'s sugar was properly condemned. *Thirty Hogshead of Sugar v. Boyle*, 9 Cr., 191.

§ 5. **Political questions.**—Islands having once belonged to one government, but now claimed by another, the United States government refusing to recognize such claimant as the rightful owner, the question of title to and dominion over the islands is one of political diplomacy, not to be adjudicated upon by the courts. The courts of this country are obliged to consider the United States government as right in its position as to the sovereignty over the islands. Thus, where two American ships, both of which were insured against loss, engaged in the seal trade, were seized at the Falkland Islands, and condemned by the tribunals of the government of Buenos Ayres, which claimed sovereignty over the islands, such sovereignty being denied by the United States, the court held both of the seizures unlawful and the underwriters liable for the amount of the policies of insurance by reason thereof. *Williams v. The Suffolk Insurance Company*, 8 Sumn., 270.

§ 6. **Grant construed.**—In ejectment against L. for part of an island in the Potomac river called Eden, L. holding under patent from the lord proprietor of Maryland, granting "all that tract or upper island of land called Eden, lying and being in Prince George county, beginning at a maple . . . and running thence north sixty degrees," etc. (giving the course and distance of every line to the beginning tree), "containing and laid out for three hundred and twenty acres of land, more or less," *held*, that the grant passed the whole island, although a re-survey shows that the lines exclude a part of the island. *Lodge v. Lee*, 6 Cr., 237.

§ 7. **Islands in Pennsylvania** are not subject to pre-emption, and the common law rule that riparian owners own to the thread of the stream never obtained in that state. *Fisher v. Haldeman*,\* 20 How., 186.

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## ISSUES.

See PLEADING; PRACTICE.

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## JAIL LIMITS.

See DEBTOR AND CREDITOR.

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## JEOFAILS.

See PRACTICE.

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## JETTISON.

See MARITIME LAW.

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## JOINDER.

See PRACTICE.

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## JOINT AND SEVERAL LIABILITY.

See CONTRACTS.

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## JOINT STOCK COMPANIES.

See CORPORATIONS.

## JOINT TENANTS.

See LAND.

## JUDGES.

See COURTS.

## JUDGMENT LIENS.

See JUDGMENTS.

## JUDGMENTS AND EXECUTIONS.

[Execution and other Judicial Sales, see SALES. For questions of practice, see PRACTICE. See, also, WRITS.]

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| <p>I. IN GENERAL, §§ 1-420.</p> <p>II. AMENDING, OPENING AND VACATING JUDGMENTS, §§ 421-544.</p> <p>III. SUITS TO IMPEACH, SET ASIDE OR ENJOIN, §§ 545-607.</p> <p>IV. ESTOPPEL BY JUDGMENT: RES ADJUDICATA, §§ 608-875.</p> <p>V. LIEN AND PRIORITY OF JUDGMENTS AND EXECUTIONS, §§ 876-1085.</p> <p>VI. JUDGMENTS OF SISTER STATES, §§ 1086-1208.</p> <p>VII. JUDGMENTS OF STATE COURTS, §§ 1209-1229.</p> <p>VIII. FOREIGN JUDGMENTS, §§ 1230-1279.</p> <p>IX. ACTIONS ON JUDGMENTS, §§ 1280-1316.</p> | <p>X. ASSIGNMENT OF JUDGMENTS, §§ 1317-1331.</p> <p>XI. RELEASE AND SATISFACTION OF JUDGMENTS, §§ 1332-1376.</p> <p>XII. CONFESSION OF JUDGMENT, §§ 1377-1404.</p> <p>XIII. REVIVOR, §§ 1405-1424.</p> <p>XIV. EXECUTIONS, §§ 1425-1777.</p> <p>1. <i>In General</i>, §§ 1425-1670.</p> <p>2. <i>What Property Subject to Execution</i>, §§ 1671-1716.</p> <p>3. <i>Exemptions</i>, §§ 1717-1729.</p> <p>4. <i>Conflict of Jurisdiction</i>, §§ 1730-1738.</p> <p>5. <i>Levy and Return</i>, §§ 1739-1777.</p> |
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## I. IN GENERAL.

**SUMMARY** — *Use of ideo consideratum est*, § 1.— *Pleading a judgment*, §§ 2, 3.— *Merger*, § 4.— *Form of final judgments*, § 5.— *Final and interlocutory*, §§ 6, 7.— *Recital of service of process*, § 8.— *Effect of judgment in a collateral proceeding*, § 9.— *Service by publication; attachment*, §§ 10, 11.

§ 1. It is not a conclusive criterion of a definitive judgment that the entry employs or omits the accustomed form "*ideo consideratum est*." Judgments when entered without that clause are final as well as when entered with it. *Whitaker v. Bramson*, §§ 12-20.

§ 2. Generally, in pleading a judgment, the precise words of the record need not be observed. But in matters of description the record produced must conform strictly to the plea. If any circumstances descriptive of the record be untruly stated, though not necessary to be stated, it will be fatal on *nul tiel record*. *Ibid*.

§ 3. A record of a judgment described as determining the rights of the party by the *consideration* and *judgment* of the court, and the *conviction* of the defendant, is not identical with one directing the same results in a different way. All the particulars set forth in the pleading descriptive of the record sued on must be proved. Thus, where a plea of former recovery averred that the plaintiffs, by the *consideration* and *judgment* of the court, recovered their damages, etc., whereof the said defendant was *convicted*, and it nowhere appeared in the record that the matter was determined by the *consideration* and *judgment* of the court, or that the defendant was convicted of anything, the variance was held fatal. *Ibid*.

§ 4. When a judgment is rendered upon a contract the contract is extinguished or merged in the judgment, and no other remedy remains to the creditor except upon such judgment. *Ibid*.

§ 5. No proceeding short of a final judgment will operate as a bar to a subsequent suit upon the same cause of action. And the judgment is final when the court puts an end to the action by declaring that the party has or has not entitled himself to the remedy he sues for, or when the language of the record imports an ultimate and final decision of the case, whether the language employed be consonant to technical *formulae* or not. *Ibid.*

§ 6. The distinction between *interlocutory* and *final* judgments is, that the first are only intermediate and do not finally determine the suit, while the latter at once put an end to the action. *Ibid.*

§ 7. In Pennsylvania a plaintiff is allowed to issue judgment against the defendant in an action upon a contract, when the defendant omits to file an affidavit of defense. But such a judgment is not complete and final — is only interlocutory — and cannot be pleaded in bar of a subsequent action upon the same contract. Especially is this the case where no amount is designated in the judgment, and it is doubtful whether the judgment must be taken for the amount of damages claimed in the declaration or for the sum of the notes sued on, with interest. *Ibid.*

§ 8. The recital in a decree that the defendant was served with process must stand as true unless there is something upon the face of the record itself which shows the contrary. And especially is this so after the elapse of many years from the rendition of the decree. And in a collateral issue no proof either in the case or out of it can be admitted to contradict such a recital unless it shows that the averment could not be true. Certainly no proof outside of the record can be admitted which would affect the rights of third persons acquired under the decree or judgment, and upon the faith of such a recital. This was a case where the petition in a foreclosure suit alleged that one B. had some interest in the land, and the decree stated that he was served with process, but the return of the subpoena showed the contrary. The court sustained the recital in the decree in favor of a purchaser under it, saying that another process might have issued and been served upon him. *Riggs v. Collins*, § 21.

§ 9. Where the record of a judgment is introduced collaterally in another suit as evidence of title, the court cannot disregard the judgment, or refuse to give it effect on any other ground than want of jurisdiction in the court which rendered it. *Cooper v. Reynolds*, §§ 22-26.

§ 10. Under a statute authorizing an attachment of the land of a non-resident, or a person who has fled from the state, upon service by publication, the judgment rendered, though in form a personal one, has no effect beyond the property attached. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other. Nor can it be used as evidence in any other proceeding not affecting the attached property. *Ibid.*

§ 11. Where the land of a non-resident or a person who has fled from the state has been sold in a proceeding to establish a demand against him and subject to its payment his property lying within the territorial jurisdiction of the court, the statute authorizing the attachment upon affidavit that the defendant is a non-resident or has fled from the state, and upon publication of notice of the suit, the record of this proceeding cannot be held void in a suit in ejectment by the debtor against the purchaser thereupon, for the reason that the affidavit was defective, the publication insufficient, or that other formalities were not complied with. If the writ of attachment was issued in proper form and levied on the property, this is all that is essential to the jurisdiction of the court, and want of jurisdiction is the only thing that can avoid the proceedings when the record thereof is introduced in evidence in the ejectment suit. *Ibid.*

[NOTES.— See §§ 27-430.]

#### WHITAKER v. BRAMSON.

(Circuit Court for New York: 2 Paine, 209-229.)

#### Opinion of the Court.

STATEMENT OF FACTS.— *Assumpsit* on two promissory notes,— one note dated October 14, 1824, for \$281.25, payable six months after date; the other dated December 17, 1824, for \$424.50, payable in six months. The declaration also contains the common money counts, and counts in *indebitatus assumpsit*. To this declaration the defendant pleaded: 1, the general issue; 2, the exemption of his body from imprisonment because of certain insolvent discharges; and 3, to the counts upon the promissory notes, a former recovery for the same cause of action.

The latter plea is the one immediately drawn in judgment; it is, after the

formal commencement, as follows: "Because, he says, that after the making of the respective promissory notes by this defendant in the said two first counts of the said declaration mentioned, to wit, on the 28th day of November, 1825, the said plaintiffs impleaded this defendant by the name of John Bramson, before the judges of the district court for the city and county of Philadelphia, in the commonwealth of Pennsylvania, in a plea of trespass on the case for the same identical promissory notes in the first and second counts of the said declaration of the said plaintiffs mentioned; and such proceedings were thereupon had in the said district court before the judges aforesaid, to wit, on the 2d day of June, 1826, that the said plaintiffs, by the consideration and judgment of the same court, recovered against this defendant by the name of John Bramson, in the plea aforesaid, their damages for the non-payment of the said two identical promissory notes in the said two first counts of the said declaration mentioned, and whereof this defendant, by the name of John Bramson, was convicted, as by the record and proceedings thereof still remaining," etc. To this plea the plaintiffs replied *nul tiel record*, upon which issue was taken.

On the trial of the cause, the defendant produced a record of a judgment in the district court for the city and county of Philadelphia, which he offered in evidence in support of his plea. The record was duly authenticated pursuant to the act of congress of May 26, 1790. The counsel for the plaintiff's objected to the competency of this proof to sustain the issue, because the record upon its face showed that no *final judgment* had been rendered in that court upon this matter; and its admissibility was objected to on account of variances between the record produced and the plea of the defendant.

§ 12. *Pleading; variance; form of final judgment.*

First, as to variances. These are supposed to consist in this: 1st, that it is averred in the plea that the plaintiffs recovered in that court their *damages for the non-payment* of the two notes, whilst the record shows that judgment was rendered *for want of an affidavit*.

That part of the record supposed to contain the judgment of the court upon those demands is in this form: "and now, to wit, on the 2d day of June, 1826, the plaintiffs, by their said attorneys, come and sign judgment against the said defendant, in the words following, to wit: 'June 2, 1826, I sign judgment in this case for want of an affidavit of defense. John C. Lowber.' And, therefore, the court direct judgment to be entered accordingly, in favor of the said plaintiffs." 2d, that the plea avers that the plaintiffs, by the *consideration and judgment* of the said court, recovered their damages, etc., whereof the said defendant *was convicted*; but that it nowhere appears by the record that the matter was determined by the *consideration and judgment* of the court, or that the defendant *was convicted* of anything claimed by the plaintiffs' suit.

It is urged for the defendant that the law does not exact a literal correspondence of the record with the plea, and that it is enough to plead a record according to its effect, without regarding the precise phraseology in which it may be framed. It certainly cannot be regarded as a conclusive criterion whether a definite judgment has been rendered, that the entry employs or omits the accustomed form of "*ideo consideratum est*." Judgments are final, and subject to review by writ of error, as well when entered without that clause as with. *Yates v. The People*, 6 John., 338.

§ 13. *In pleading a judgment it is not necessary to use the precise words, except in matters of description.*

Neither generally, in pleading a judgment, need the precise words of the record be observed. Surplusages or immaterial omissions in matters of substance, in pleading records, are attended with no other consequences than in other cases. Arch. Civil Pl., 362, 376. But as to matters of *description* it is otherwise, and there the record produced must conform strictly to the plea. It has been considered that if any circumstances descriptive of the record be untruly stated, though they were not necessary to be stated at all, it will be fatal on *nul tiel record*. Lawes on Pl., 670. This is because the issue puts in question the identity of the record set up as evidence of a former recovery.

§ 14. *Party pleading a record prout patet must maintain it literally.*

The party, by pleading a record with a *prout patet*, proffers that issue, and it is incumbent on him to maintain it literally (*Purcell v. Macnamara*, 9 East, 160); this, as well where the averment has reference to particulars which need not be specifically stated upon the record, as to those which must be so. Upon these principles, if the phraseology in which the judgment is narrated in the plea is to be taken as *descriptive* of the record evidencing such judgment, no departure from it in the proofs can be allowed. A record described as determining the rights of the party, by the *consideration* and *judgment* of the court, and the *conviction* of the defendant, would not be identical with one directing the same results, but in a different way. *Phillipson v. Margles*, 11 East, 516. The like rule prevails in relation to other instruments. A declaration upon a note, as containing the words *for value received*, cannot be supported by proving a note without these words (10 Johns., 418); yet they add no efficacy to the instrument. 9 Johns., 217; Bayley on Bills, 24, 25.

§ 15. *Matters descriptive of the record must be established by proof, or the variance is fatal.*

These doctrines are discussed and applied in the elementary books. 3 Starkie, Ev., 1531, 1532, 1533, 1593, 1596, 1598, 1600, 1604. The current of the cases and the principles on which they rest clearly tend to show that all the particulars set forth in pleading, *descriptive* of the record or instrument on which the party relies, must be established by his proof or the variance will be fatal. In my opinion this case falls within those principles. The record of the former judgment is the only evidence the defendant can offer in support of his plea; and as his plea makes various allegations *prout patet*, or as contained upon the record, it is manifest that it assumes to *describe* the precise contents, so as to *identify* the record on which the defendant relies. The record produced not comporting with this description, the variance is fatal. The defendant, however, insists that if his record cannot be given in evidence under the plea, on account of the variance, yet that he may avail himself of it under the general issue.

Such, no doubt, is the rule of evidence (1 Chitty, Pl., 572; 2 Saund., Pl. and Ev., 134; 1 Saund., 92; 3 Wend., 272); but it is intimated to be questionable whether the proof would be received without a notice of the special matter. 3 Cowen, 120; 4 Cowen, 558. I do not propose to discuss this point, as my judgment will be placed upon the other leading point in this case, to wit, whether this record proves a final judgment; although I am free to say that the inclination of my opinion is that the defendant may give such evidence under the general issue, *without notice*, for the reason that the proof shows

that, when the suit was instituted, the plaintiff had no such cause of action. The former contract was extinguished or merged by the judgment into which it had passed, and no other remedy remained to the creditor but upon such judgment. 3 Wash., 17; id., 558; 1 Pet. C. C., 74; id., 155.

§ 16. *A judgment must be final to operate as a bar.*

The main question in the case is, whether the record produced proves that a definitive judgment has been rendered by a competent court upon the subject-matter of this suit. It is clear that the judgment must be final to operate as a bar. But courts do not consider their suitors concluded by the pendency of an action in any other court for the same matter, or by any course of proceedings thereon short of final judgment. 9 John., 221; Tidd, Pr., 977.

In the language of a majority of the court of errors, in the case of *Yates v. The People*, 6 Johns., 401, 457, 458, a judgment is *final* when the court puts an end to the action by declaring that the party has or has not entitled himself to the remedy he sues for; or, as Judge Spencer expresses it, the judgment is complete when the language of the record imports an ultimate and final decision of the case, whether the language employed be consonant to technical formulas or not. The distinction between *interlocutory* and *final* judgments is that the first are only intermediate and do not finally determine the suit, whilst the latter at once put an end to the action. 3 Bla. Com., 395, 399; 2 Saund., 30.

§ 17. *Judgments obtained in different states have the same effect in every other state.*

Under the constitution and act of congress, judgments obtained in the different states have a like effect in every other state as in that where they are rendered. Although, therefore, they in fact are proceedings of foreign and independent tribunals, they bear the character of judgments of courts of concurrent powers with those where they are offered in evidence. This consideration, if it does not vary the application of the common law rule in relation to foreign judgments, at least opens more distinctly the inquiry into the *character and effect* of the judgment in its home forum. The English courts regard no foreign judgment as conclusive between the parties, unless it is of a *form* to render it so, if obtained in one of their own courts. This is the result of the decision in *Plummer v. Woodburne*, 4 Barn. & Cresw., 625. In that case the record set forth that *the jury found for the defendant, and that judgment was rendered by the court upon and agreeably to the said verdict*, and it was held to be no bar when pleaded as a former recovery. Yet it might well happen in the diversified practice of courts in the different states, in many respects notoriously conducted without much observance of common law rules, that a judgment in that form would be deemed final and complete.

§ 18. *The record is presumed to conform to the law of the state so far as it goes.*

We are to investigate and settle the *faith and credit and effect* this judgment would have in Pennsylvania, and whether or not a greater or less credit would have been given it if obtained in one of our courts. We are to regulate the influence of this record by the former and not by the latter consideration. *Hampton v. McConnell*, 3 Wheat., 234. This court cannot infer, from principles of general law, what course of proceedings must necessarily have been adopted to obtain a complete judgment in a neighboring state. It will be pre-

sumed that this record conforms to the law or usage of that state, so far as it purports to go.

If it was competent to the plaintiffs to show such inference to be inaccurate, it might be competent for them, under this issue, to give the evidence to the court, as there may be averments and proof against the supposed *operation* of a record. 1 Pet., 692. A plaintiff in Pennsylvania is allowed to issue judgment against the defendant in action upon contract, when the defendant omits to file an affidavit of defense. This practice, it is believed, is peculiar to that state. The competency of the district court to establish such a course of practice has been ably contested, and, though ultimately upheld, it was by the opinion of a divided court. *Vanatta v. Anderson*, 3 Binn., 417.

The question now arising is, whether the judgment authorized by this rule is *final* in the first instance. It would certainly add to the singularity of this mode of procedure, if the plaintiff, by his simple fiat directing this species of judgment, could conclude the defendant in a matter of unascertained damages, and become entitled to recover whatever he *claims* to be due, without having that claim sanctioned by a jury or the court. .

This is certainly not so ordinarily by the practice of that very court, in cases of *indebitatus assumpsit*. The case of *Coates v. M'Cam*, 2 Browne, 175, was of that character; but in order to fix with certainty the demand of the plaintiff, the defendant called for a bill of particulars, which was accordingly furnished at his instance. No affidavit of defense being filed in time, judgment was signed for that cause, and an execution issued, without any previous inquisition to ascertain the damages. A rule was obtained for the plaintiff to show cause why the judgment and execution should not be set aside.

After discussing various points in relation to the pleadings and former condition of the cause, the court say: "The plea in abatement being too late, the court are of opinion *that it was regular to sign judgment for want of an affidavit of defense*. But as no *inquisition* has been held to ascertain the damages, the execution must be set aside; and if the defendant has merits, he can avail himself of the defense before the inquest." 2 Brown (Penn.), 173.

There would seem to be no greater necessity for an ulterior proceeding in that case to ascertain the damages, after the defendant had been apprised in answer to his own call, by a bill of particulars, what the specific demand was, than in an action on promissory notes. The declaration on promissory notes is always upon the face of them, without regarding the indorsements upon the notes themselves; and if there be no act of court ascertaining the sum actually due, it is manifest that the promisor or his representatives might thus be subject to pay the full amount, where the notes themselves bore evidence of their being nearly satisfied.

§ 19. *The sum for which judgment is directed must be certain to make it final.*

This court would look for very satisfactory evidence that a practice so loose and liable to abuse was sanctioned in the enlightened tribunals of a neighboring state, before we could recognize and affirm it. It, therefore, appears to me, there is a substantive defect in this record, if to be considered one of final judgment, in not determining with certainty the sum for which judgment is directed. The very nature of a judgment imports that the indeterminate claims of a party are reduced to a certainty of the highest order, and one which can nevermore be questioned by the debtor. It is, as is said by the



Pennsylvania court (2 Serg. & R., 142), a most loose and faulty practice, in suits claiming money, to pass judgment against one party and in favor of another, and then leave it to the discretion of him in whose favor the judgment stands, to determine for himself how much he will take under it.

Judgments for the penalty on bonds for the payment of money are not analogous. There the judgment is for a *specific sum*. Strictly, at law, the penalty would be the sum the plaintiff was entitled to collect; but courts of law exercise an equitable jurisdiction over the judgment, and restrain the creditor from receiving more than the money actually due, with interest and costs; but the body and estate of the debtor are subjected, by the terms of the judgment, to pay a specified sum. Here no amount is designated by the judgment, limiting the recovery of the plaintiff; and on the argument, the counsel for the defendant seemed in doubt whether the judgment must be taken to be for the \$700 damages claimed by the declaration, or for the sum of the two notes, with interest.

The rule of the district court of Philadelphia, above stated, provides explicitly in one case that the judgment shall be for a precise sum; and if the defense be to part only, the "defendant shall specify the sum which is not in dispute, and *judgment shall be entered for so much as* is or shall be acknowledged to be due to the plaintiff." It is difficult to perceive a reason for designating the sum recovered in one case, which would not equally exact it in the other; and the only interpretation I can give the rule is, that in the latter case, the sum being fixed by the confession of the party, a final judgment is at once rendered for the amount; but in the other, the amount being undetermined, the judgment is only interlocutory, and to be made final when the appropriate proceedings shall be had for ascertaining the sum to be recovered.

This would conform the judgments under that rule to those obtained at common law (14 Vin., 612; 6 Dane, Ab., 90; Lawes on Pl., 669), it being indispensable to a full judgment that what it gives or denies should be distinctly expressed. There is no satisfactory evidence before me that the courts in Pennsylvania hold anything to be a complete judgment short of the requisites at common law. The case of *Lewis v. Smith*, 2 Serg. & R., 142, goes further than any other case towards supporting the judgment set up in the present instance. There an action of *indebitatus assumpsit* was brought on a debt of \$30,000, claiming \$60,000 damages.

The defendant gave a plea of *confession*, upon which a *general judgment* was entered for the plaintiff, neither the plea nor the judgment designating the amount to be recovered. The validity of the execution and subsequent proceedings upon this judgment were subsequently brought in question before the supreme court, it being contended that this could not be considered anything more than an interlocutory judgment.

So the court clearly intimate it should be considered upon general principles; but they found themselves controlled by a long-established course of practice which had obtained in that state, to enter judgments *by confession* in that way, and to deal with them as complete judgments, at least for the purpose of issuing execution and recovering the money thereon against the judgment debtor. The court reprehends the practice, in strong terms, as loose and improper; but they think it had so far acquired the sanction of *usage* as that it could not be abrogated without a formal rule duly promulgated.

But it will be perceived that the two judges who sat in the decision of the case mark, with the most cautious distinction, this as a *case upon confession*,

and that the parties *intended* it should be *final*. Tilghman, C. J., says: "I take it, that where judgments are *confessed*, if the plaintiff's demand is in the nature of a debt, which may be ascertained by calculation, whether it arise on a note or other writing, or on an account, it is sufficient to enter *judgment generally*. The judgment is supposed to be for the amount of damages laid in the declaration, and the execution issues accordingly." Again: "That this was intended by the parties as a *final*, and not *interlocutory* judgment, I am well satisfied." The chief justice refers to two particulars in the proceedings establishing the understanding of the parties: first, that a stay of execution had been given on the judgment; second, that on its revival by *scire facias* as a judgment for \$60,000, the defendant had also confessed judgment to the *sci. fa.*

Yates, J., concurred with the chief justice in considering the judgment as *final* in contradistinction to *interlocutory*, which does not bind lands. He says: "It was not a judgment by *default*, but by *confession*; it contained a stay of execution for sixty days and the subsequent judgment agreed to by the defendant showed the intention of the parties *that they considered it final*. I see nothing incorrect herein."

§ 20. *Judgment by confession.*

It is manifest that the court meant their decision should extend no further than to judgment *by confession*, and it is even doubtful whether the mere fact of confessing judgment would be enough to sustain one entered as that had been, without other circumstances concurring to denote the intention of the parties that it should be *final* and *complete* as between them. The case is no authority beyond that point; it does not assume to touch the mass of judgments entered *for want of affidavits of defense*, but would rather seem, by broad implication, to consider all such as imperfect judgments, they being certainly no higher than judgments by *default*. The case of *Coates v. McCamm* is not affected by this decision, and that case is entitled to great regard on this point, as it occurred in the court which adopted the rule under consideration, and must be considered an exposition of the true meaning of the rule or a limitation of its action.

The case of *Lewis v. Smith*, 2 Serg. & R., 142, also clearly recognizes the doctrine of the common law, as governing in this respect the proceedings of the Pennsylvania courts, other than in the excepted case. That case looks for all the constituents to a perfect judgment that would be required in this state or at Westminster Hall. At all events it does not establish the point that a *general judgment* for the default of the defendant is complete and final, nor that any judgment not for a specified amount could be good on a contract for the payment of money, other than when entered upon the *confession* of the party.

Another criterion which may justly be applied to the judgment is to inquire whether an action of debt would lie upon it, or any other action which would enable the plaintiff to enforce it in this state. It would be difficult to frame a declaration upon it which would be sustained by the record. There is an inexplicable ambiguity upon the face of the record, if it evidences a final judgment, whether the amount of the promissory notes with interest, or the specific sum of \$700, is awarded by the court; and though it might equally well support either assumption, yet it would not be sufficient to establish one or the other. Upon this view of the case I feel compelled to consider this judgment as no more than *interlocutory*, and therefore, whether admissible in

evidence under the general issue or well pleaded, it would be no bar to the plaintiffs' recovery in this action. And without pursuing the argument into the further illustrations it might admit, I shall rule in relation to the two prominent points in the case, that the record does not comport with the plea, nor is it proof of a final judgment and former recovery which bars this action. Judgment for plaintiff.

## RIGGS v. COLLINS.

(Circuit Court for Illinois: 2 Bissell, 268-281. 1870.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—This land was purchased of the United States by J. B. F. Russell, in 1836, and although the patent was not issued until 1839, yet, under our law, between the date of the purchase and the issuing of the patent, he is treated as the owner of the land, as against all persons except the United States. On the 13th of May, 1837, Russell, being thus the owner of the land in controversy by purchase, conveyed it to Josiah S. Breese, but the deed was not recorded in the county of La Salle, where the land was then located, and was not, in point of fact, recorded in the county where the land was situate, until the 7th of June, 1861, when it was recorded in the county of Grundy, where the land then was. On the 21st of December, 1837, J. B. F. Russell made a mortgage of the land in controversy, including various other tracts, to Henry P. Gilpin, the solicitor of the treasury, in trust for the United States, and in May, 1838, this mortgage was duly recorded in the county of La Salle, where the land was then located. Although Russell had previously conveyed the land to Breese, as that conveyance was not recorded in the recorder's office of the proper county at the time the mortgage was made to the United States, and as there is no evidence tending to show that the United States then had any notice of the existence of this prior deed to Breese, the mortgage conveyed a good title to the United States, as mortgagees of the land, under our registry laws.

The amount for which this land and the other tracts were mortgaged to the United States was more than \$50,000. On the 1st day of September, 1840, a bill was filed in the circuit court of the United States for the district of Illinois, by the United States, to foreclose the mortgage. Various persons besides Russell were made parties defendant to the bill, the averment being that Breese and others, naming them, had "some interest in the premises, as judgment creditors or otherwise." "The premises," as I have already stated, included several tracts of land, and this section 26 among others. A subpoena, or, as our local law terms it, a summons, was issued upon the filing of this bill, on the 1st day of September, 1840, and made returnable on the first Monday of the December term of that year. It included, as defendants, Breese and others. The return upon the summons states that it was served upon several of the defendants—less than all—and the return concludes by stating the others were not found within the district; and among those not found was Breese, the party to whom Russell had conveyed the land in controversy, in 1837. Although there is no evidence that the government had any notice of the existence of this prior deed at the time that the mortgage was made and delivered, it is clear that when the bill was filed it had some knowledge of the claim of Breese. True, the allegation in the bill is of the most general character, and does not distinctly set forth what the interest was, or in what

tract of land among all those named in the mortgage. But still the attention of the government was called to the fact that Breese had some interest in the land, and therefore it might be said that there was a claim stated which it would be incumbent on any party, subsequently acquiring a right, to trace up and ascertain its character.

In the bill of costs taxed in the case, it seems that there are costs taxed only for one writ. Some evidence was introduced which was received subject to objection, to the effect that Breese was not, at the time the summons was issued and returned, an inhabitant of the state of Illinois, but that he had prior to that time removed elsewhere. This is all there is in relation to this matter up to the time when the decree of foreclosure was rendered in June, 1841. At that time the title of the suit was entered on the record, including the names of all the defendants, and that of Breese among others. The decree declared that the defendants had been duly served with process. The precise language in which the entry is made is as follows: "This day came the said plaintiffs, by their solicitor, and the said defendants having been duly served with process, and failed to appear, as by the within writ they were commanded, and having failed to answer the complainant's said bill of complaint herein filed, although more than three calendar months have elapsed and passed by since the return of the writ aforesaid, upon them executed." And then follows the decree. The court directed a reference to a master, under which a report was made, and then an order of sale of the mortgaged premises, at which sale the section in controversy was struck off to the United States for the sum of \$641. The land was sold in separate parcels. After the sale, and after a deed from the master was executed to the United States, the latter, on the 28th of December, 1847, through the solicitor of the treasury, who was the authorized agent of the government for that purpose, under the act of 1830, conveyed this section of land and other tracts to W. W. Corcoran, and the deed, together with the deed from the master to the United States, was duly recorded in the county where the land was situated — the master's deed in April, 1843, and the other in July, 1848. W. W. Corcoran, in 1866, conveyed this section of land to the plaintiff, and this is the title of the plaintiff. The defendant claims title through the unrecorded deed of Josiah S. Breese.

The questions in the case appear to be: *First*, whether it will be presumed upon the face of the decree and the record that the averment contained in the decree, that service of process was made on Breese, is true; and if not, *secondly*, what was the effect on the title of the United States, or of Corcoran, of the allegation in the bill that Breese had some interest in the land.

I will consider this last question first. Admitting, therefore, that Breese was not a party to the proceedings to foreclose the mortgage; that is to say, although named, he was not served with process, then he would not be bound by the decree, and his equity of redemption would be a subsisting equity, unless it has been lost by something independent of the proceedings in the foreclosure suit; then, that being so, what would be the position of the United States, or of a purchaser from the United States? I apprehend it would be this: Although at the time of the decree of foreclosure and of the filing of the bill, it may be said that the government had knowledge of a claim of Breese to the premises, still, as already stated, when the mortgage was made, there was no notice of such a claim, and therefore it would be a valid mortgage of this land under our registry law. Then, when the deed was made by the solicitor of the treasury, under the circumstances in evidence, of this tract of

land to Mr. Corcoran, it would be by a mortgagee who was the purchaser at a sale, the purpose of which was to foreclose the mortgage and deprive Breese of his equity of redemption, and whether this was effectual or not, as the government was a mortgagee, and would, as such, hold the legal title, the purchaser, under the decree, and from the mortgagee, would also be a mortgagee, and would thus represent *pro tanto* the debt which the mortgage was given to secure; and the rule which it is claimed sometimes prevails, that the mortgaged premises cannot be transferred or conveyed irrespective of the debt which the mortgage was given to secure, would hardly apply. It would have to be treated, I think, substantially as though it were a transfer *quoad hoc* of the debt which the mortgage was given to secure, and therefore the purchaser from the United States would also be the mortgagee, and would have the legal title to the land, as the United States had, and so, default having been made in the payment of the sum due on the mortgage, would have the right to maintain an action of ejectment.

As I understand, this is the effect of the decision of the supreme court of this state, made in the case of *Carroll v. Ballance*, 26 Ill., 9. But, however this may be, I am of the opinion that as the case now stands, as to the first question named, it must be considered that the equity of redemption, if that was the interest which Breese had and was referred to in the bill, is gone under the foreclosure suit, because Breese must be regarded as one served with process.

§ 21. *The recital in a decree that a defendant has been served with process is, after the lapse of many years, conclusive of that fact, unless the record shows that such recital cannot be true.*

It is thirty years, very nearly, since this decree was rendered. Breese was a party to the bill. The decree recites that service was had upon him — that is, it names all the defendants, and declares the defendants were duly served with process: and after the lapse of so much time, it seems to me that the averment in the decree must stand as true, unless there is something upon the face of the record itself which shows that such was not the fact at the time it was made. There are some decisions of the supreme court of our own state, perhaps, which go the length of declaring where a record recites that process was served, when it clearly appears it was not, and could not have been, that when the question comes up even collaterally, the court will not regard as conclusive the averment of the service of process. A case relied upon on the part of the defendant was that of *Goudy v. Hall*, 30 Ill., 109. But, although the court says in that case that the judgment recited that the process was served, when it appeared it was not, it would not be treated as binding, yet that statement was not necessary to the decision of the case, because the court held that there was nothing in the proof inconsistent with the recital in the judgment that due notice had been given. But this case, even if we admit the correctness of such decisions or *dicta*, is not within any principle there decided. For it is possible that another writ issued from this court, returnable to the first Monday of June, 1841. We know that the process returnable to the first Monday of December, 1840, was not served on Breese; we do not know that another process was not issued and served on him, and, therefore, he might have been duly in court on the first Monday of June, 1841. This seems to be a sound principle — that in a collateral issue, if any proof whatever, either in the case or out of it, is to be admitted, to contradict the decree, alleging due service of process, that proof must show that the averment could not

be true. And this case is not brought within that rule, for it is quite possible that another summons was issued, served and returned, and that it is lost or mislaid. We must presume, in the absence of clear proof to the contrary, that the averment that Breeze was duly served with process was true, and especially after the lapse of so many years. But if we assume this to be so, *prima facie*, the decision of *Rivard v. Gardner*, 39 Ill., 125, is to the effect that proof, outside of the record, is not admissible to contradict it, where that proof would affect the rights of third persons, acquired under the judgment or decree of the court. It is admitted, in that case, that there is some conflict in the authorities; but the language of the court is: "We entertain no doubt that the rule forbidding the return to be contradicted, as against third persons who have acquired rights under the judgment of the court, rests upon the sounder reason. The importance of the rule, as a question of public policy, upon which the principles of law are designed to rest, is most apparent. The public should be permitted to purchase property sold under the judgment or decree of a court, without the apprehension that at some distant day their titles may be divested by parol testimony that the return of the officer, upon which such judgment was rendered, was falsely made."

It is true that the question in that case was as to the return of the officer; but if we concede the effect to be given by the recital in the decree, then the principle is precisely the same in this case.

It seems to me that the case of *Miller v. Handy*, 40 Ill., 448, decides a principle applicable to this case. There the question arose on a judgment on a *scire facias* to foreclose a mortgage. By our statute, when there is no service of the *scire facias* on the party to be affected by it, it requires what is termed two *nihil*s; and in that case the judgment of the court recited that there had been due service, as prescribed by law, in order to foreclose the rights of the mortgagors. But only one writ was found in the case upon which the return of *nihil* was made, and yet the court, where the question came up collaterally, and the rights of third persons were to be affected, held that it would presume in favor of the recital in the judgment that there was another writ, which had been properly returned. And why? Because there had intervened one or more terms between the date of the first writ and the judgment of foreclosure, when there might have been another writ issued and returned. "We are to presume," the court says, "on the faith of the finding of the court, that such was the fact,"—that is to say, that the averment in the judgment was true—"that there was time and opportunity for it, and it is stated as a fact found by the court that two *nihil*s had been returned. Is it just or consonant with right? Is it protective of the interests of the public that the mere absence from the files of one of these writs shall rebut the presumption upon a prior finding of the court, at the very incipency of the judgment, and that, too, after the lapse of more than twenty-five years? The necessity of such a presumption is fully discussed in the case of *Reddick v. State Bank*, 27 Ill., 148. We there said: "It does not seem reasonable to require a party who has purchased land under the judgment of a court of competent jurisdiction, *bona fide*, and with no notice of any such defects as the absence of a summons or notice, to be put in jeopardy of his title or be required to take the risk of the loss or abstraction of a loose paper from the files, when the decree or judgment of the court recites the fact that process was duly served or the required notice duly given. These are facts lying at the very threshold of the case, and on which the court is required to be informed and to pro-

nounce, just as much as upon any other fact in the cause. . . . We cannot perceive any reason why the rights of parties depending upon these preliminary facts should not be as secure, unless impeached by the record itself, as upon any other adjudicated facts in the cause, especially after the lapse of more than a quarter of a century."

Now, this reasoning applies with peculiar force to this case. Here is a party wishing to make a purchase of a tract of land. It is offered for sale by the government of the United States, under a title resting upon a mortgage made in 1837. There is nothing whatever upon the files of the record in the proper county, where the land is situated, which affects in any way the validity of this mortgage. There is nothing which affects the sale made under the decree of foreclosure to the United States of his tract of land, except what is recited in the bill, that Breese had some interest in the land as a judgment creditor or otherwise. Breese is a party to the bill of foreclosure. The decree of foreclosure recites that process was duly served upon him. Is not that, and ought not that to be, satisfactory evidence to the party seeking to make the purchase, that he has obtained a good title under the mortgage, as against the mortgagor, and so against all parties whom the decree recites were then served with process? I think that question must be answered in the affirmative, if there is nothing in the record itself which shows that the averment in the decree could not be true. It is only in that way, as it seems to me, that we can give stability to the decrees and judgments of courts, and to titles obtained under them, especially after the lapse of so many years.

Now, in this case, it may be said that Breese obtained a good title, that it failed on the technical ground of want of record, and that, in equity, his claim is valid. That is one view of the case, undoubtedly; but there is another equally strong, and even stronger, as a matter of mere equity, growing out of the foreclosure suit and averment of service of process upon Breese and the *bona fide* purchase by Corcoran of the title of the United States obtained under this decree of foreclosure. There can be no question of the entire good faith of Corcoran in making this purchase, of his ignorance of any claim whatever on the part of Breese to this land, unless upon the constructive notice which arises on this averment in the bill.

The proof shows that under this title, thus obtained, taxes were paid upon this land for seventeen years, from 1848 to 1864, inclusive. Then the equity, it seems to me, of the plaintiff's title is as strong as any supposed equity on the part of the defendant. The issue and judgment of the court will therefore be for the plaintiff. (a)

#### COOPER v. REYNOLDS.

(10 Wallace, 308-321. 1870.)

ERROR to U. S. Circuit Court, Eastern District of Tennessee.

STATEMENT OF FACTS.—Brownlow brought suit in a state court in Tennessee against Reynolds for false imprisonment, and obtained an attachment in aid, which was levied upon lands of Reynolds. There was no personal service, but publication was ordered as provided for in the Tennessee attachment law, but the record did not show that notice was published. There was judgment by default, and at the sale thereunder Cooper purchased the land and was put

(a) Affirmed, *Collins v. Riggs*, 14 Wall., 491.

in possession. Reynolds then sued him in ejectment, and at the trial the record of the proceedings aforesaid was put in evidence.

Opinion by MR. JUSTICE MILLER.

The objections taken to the proceeding in attachment under which Cooper, the defendant below, claimed title, are, 1st, that by the law of Tennessee the attachment could not be issued at the beginning of the suit where the action was *ex delicto*, but could only be issued after suit commenced; 2d, that the affidavit was defective; 3d, that there was no publication of notice, as required by the statutes. The question of the conformity of these proceedings to the requirements of the statutes under which they were had has been very fully discussed by counsel, and if we were sitting here as on a writ of error to the judgment of the state court under which the land was sold, we might not find it easy to affirm or reverse the judgment on satisfactory grounds, notwithstanding the abundant citation of authorities from the Tennessee courts. But we occupy no such position. The record of this case is introduced collaterally as evidence of title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

§ 22. *It is a legal axiom that a judgment cannot be attacked collaterally except to show that the court had no jurisdiction or that the judgment rendered was beyond its power.*

It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law. But that its applicability to the present case may be thoroughly understood, reference is made to the most important of the decided cases in this court and in the supreme court of Tennessee. *Kempe v. Kennedy*, 5 Cranch, 173 (COURTS, §§ 508-9); *Thompson v. Tolmie*, 2 Pet., 157 (COURTS, §§ 475-79); *Voorhees v. Bank of United States*, 10 id., 449; *Grignon v. Astor*, 2 How., 319 (COURTS, §§ 496-500); *Harvey v. Tyler*, 2 Wall., 328 (COURTS, §§ 468-74); *Florentine v. Barton*, id., 210 (EST. OF DEC., §§ 351-53); *McGoon v. Scales*, 9 id., 23; *Stevenson v. McLean*, 5 Humph., 332; *Britain v. Cowen*, id., 315; *Lee v. Crossna*, 6 id., 281; *Kilcrease v. Blythe*, id., 378; *Reams v. McNail*, 9 id., 542; *McGavock v. Bell*, 3 Coldw., 512. It is necessary, therefore, in the present case to inquire whether the errors alleged affect the jurisdiction of the court. It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

§ 23. *Jurisdiction over the subject-matter means the nature of the cause of action and of the relief sought.*

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.



§ 24. *Jurisdiction of the person is obtained by service of process or by voluntary appearance.*

Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

§ 25. *Jurisdiction of the res is obtained by seizure under process.*

Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.

It is to be observed that in reference to jurisdiction of the person the statutes of the states have provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute. So, also, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court.

When we come to the application of these principles to the case before us, that which leads to some embarrassment is the complex character of the proceeding which we are to consider. Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: first, the judgment of the

court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.

Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

§ 26. *When property has been seized, condemned and sold under a writ of attachment, the jurisdiction of the court cannot be attacked collaterally for want of sufficient publication of notice.*

So, also, of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice.

We do not deny that there are cases which, not partaking of the nature of proceedings *in rem*, when the judgment is to have an effect on personal rights, as in divorce suits, or in proceedings to compel conveyance, or other personal acts, in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction.

It is not denied that the court had authority to issue writs of attachment against the property of persons absconding the state, and that such writs could issue in actions for torts. The court has a general jurisdiction as to torts, and attachment is one of its remedial agencies in such cases. Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction. If it is, any other error which affected a party's rights could as well be held to affect the jurisdiction.

Such departures from the rules which should guide the court in the conduct of a cause are not errors which render its action void. The case of *Voorhees v. The Bank of the United States*, 10 Pet., 449, was much like this, and required stronger presumptions in favor of the jurisdiction of the court to sustain its acts than the one before us.

The defendant there, as here, held land under attachment proceedings against a non-resident who had never been served with process or appeared in the case. No affidavit was produced, nor publication of notice, nor appraisalment of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of the court, all of which are specially required by the act regulating the proceedings in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects we have mentioned, and that they were not fatal in a collateral proceeding.

In the present case there is a sufficient writ of attachment, its levy and return, the judgment of the court, on trial by jury, the order to sell the property, the sale under the *venditioni exponas*, the writ of possession, sheriff's deed and actual delivery of possession under order of the court. To hold them void is to overturn the uniform course of decision in this court, to unsettle titles to vast amounts of property long held in reliance on those decisions, and, in our judgment, would be to sacrifice sound principle to barren technicalities; and after a careful examination of the reported cases on this subject, we believe this to be the law as held by the courts of Tennessee. Judgment reversed, and a new trial ordered.

Dissenting opinion by MR. JUSTICE FIELD.

I dissent from the judgment in this case. I am of opinion that the state court of Tennessee never acquired jurisdiction in the case of *Brownlow v. Reynolds*.

§ 27. Final judgments or decrees.—In an action of debt upon a note of hand, a default admits the execution of the note, and the judgment is final, leaving the clerk to make it up in form. The affirmance of such a judgment at a subsequent day by the court, and calculation and entry of the amount, adds nothing to the legal effect of the judgment, and such entry may be considered as having relation to the first entry. *Clements v. Berry*, 11 How., 398 (§§ 944-46).

§ 28. A court which had rendered a judgment against a city ordered the issue of a *mandamus* to compel the levy of the tax. A portion of the taxable property being omitted, a further *mandamus* compelling a levy on such property was ordered. On a subsequent day in the same term a motion was made to set the order aside, but the motion was overruled and that order was re-entered. Held, that it was a final judgment subject to examination on writ of error. *Memphis v. Brown*, 4 Otto, 715.

§ 29. A judgment that a principal was not liable on his bond because of his discharge in bankruptcy is a final judgment, as is also a judgment that the sureties thereon are liable notwithstanding such discharge. *O'Dowd v. Russell*, 14 Wall., 402.

§ 30. A judgment by default is either interlocutory or final. When the action sounds in damages, it is only interlocutory—that the plaintiff shall recover his damages, leaving the amount of them to be afterwards ascertained. But where the amount of the damages is entered by the calculation of the clerk, no further steps being necessary by jury or otherwise to ascertain the amount, the judgment is final. *Clements v. Berry*, 11 How., 398 (§§ 944-46).

§ 31. To extend a judgment so as to embrace subjects not within it is to make a new judgment. The supreme court, in the exercise of its ordinary appellate jurisdiction, can take cognizance of no case until a final judgment or decree shall have been made in the superior court. *Life & Fire Insurance Co. of New York v. Adams*, 9 Pet., 573.

§ 32. A judgment awarding a writ of restitution in an action of ejectment, where, in the

execution of a writ of *habere facias possessionem*, the sheriff had improperly turned a person out of possession, is not a final judgment in a civil action. *Smith v. Trabue*, 9 Pet., 4.

§ 33. A final judgment cannot be rendered against one of several joint defendants on the merits, while the action is pending against the others. *Frow v. De La Vega*, 15 Wall., 552.

§ 34. The judiciary act of 1789 authorizes the supreme court of the United States to issue writs of error to bring up final judgments or decrees in a civil action. The decision of a United States circuit court upon a rule or motion is not of that character. Such decisions are not final judgments. *Toland v. Sprague*, 12 Pet., 300.

§ 35. Mortgagees in Louisiana filed in the United States circuit court their petition stating the non-payment of the debt due on their mortgage, and that, by the laws of Louisiana, the mortgage imports a confession of judgment, and entitles them to executory process, which they prayed for. Without any process requiring the appearance of the mortgagors, one of whom resided out of the state, the judge ordered the executory process to issue. Two of the defendants, who were residents in the state, prosecuted a writ of error on this order to the supreme court of the United States. *Held*, that the order for executory process, the debtors not being before the judge when he granted the same, could not be regarded as a final judgment of the circuit court on which a writ of error could issue. *Levy v. Fitzpatrick*, 15 Pet., 167.

§ 36. A judgment of an appellate court reversing that of an inferior court, and awarding a *venire facias de novo*, is not a final judgment. *Houston v. Moore*, 3 Wheat., 433.

§ 37. A final decree is one which determines all the principles of law and equity arising in a case, and which gives direction for carrying the principles so decided into execution. If decrees which are made after all evidence is taken, and full and final argument heard, and which determine all questions raised, do not go on to provide for carrying into complete execution the principles decided, they are in that respect defective. They are final decrees, though as such they may be defective in their ministerial parts. *Scott v. Hore*, 1 Hughes, 163.

§ 38. A decree in a suit relating to the ownership of stock and its transfer, which determines the ownership and directs a transfer accordingly, is final though certain accounts are directed to be taken. *Thomson v. Dean*, 7 Wall., 342.

§ 39. A decree which dissolves an injunction restraining trustees under a deed of trust from proceeding to sell the trust property, and directs that the trustees proceed to sell the property and pay the money into court, is a final decree. *Railroad Co. v. Bradley*, 7 Wall., 575.

§ 40. A decree directing the payment of money into court for the benefit of the plaintiff is a final decree, and an appeal lies therefrom. *Wabash & Erie Canal Co. v. Beers*, 1 Black, 54.

§ 41. A decree of the court below that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain sum of money to the complainant; that the complainant should have execution for these several matters; that the master should take an account of the profits of the lands and slaves, and also an account of certain money and notes, and then said decree concluding as follows: "and so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises, and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs," was a final decree within the meaning of the acts of congress, and an appeal from it will lie to the supreme court of the United States. *Forgay v. Conrad*, 6 How., 201.

§ 42. A decree of foreclosure directing the sale of mortgaged property is a final decree from which an appeal may be taken. *Bronson v. La Crosse & Milwaukee R. Co.*, 2 Black, 524.

§ 43. A decree of foreclosure of a mortgage and sale are to be considered as the final decree in the sense of a court of equity. *Whiting v. Bank of the United States*, 13 Pet., 6.

§ 44. An order of a circuit court in a foreclosure suit, made in intended pursuance of a mandate of the supreme court, and ascertaining the amount of interest due, directing payment and providing for a sale in case of default, is a decree, and a final decree, from which an appeal will lie. *Milwaukee, etc., R. Co. v. Soutter*, 2 Wall., 440.

§ 45. The decision of a United States district judge, awarding a perpetual injunction against a treasury warrant of distress, is a final decree within the act of congress of March 3, 1803, which allows an appeal from all final judgments or decrees of a district court to the circuit court. *Porter v. United States*, 2 Paine, 313.

§ 46. A direction to tax costs contained in a decree final in its nature, or the fact that the costs have not been taxed, will not change such decree to an interlocutory one. *Craig v. Steamer Hartford*,\* 1 McAl., 91.

§ 47. A decree which settles the whole law of a case, and leaves nothing to be done unless a new application is made on the foot of the decree, is final within the meaning of the statute relating to appeals. *French v. Shoemaker*, 12 Wall., 86.

§ 48. A decree is not the less final because, instead of declaring that judgment is entered, it directs that judgment be entered. *Craig v. Steamer Hartford*,\* 1 McAl., 91.

§ 49. Decrees in the district court in California land title cases which ascertained the authenticity of the claimant's title and declared its operation generally, leaving the question of boundary to be afterwards determined, were treated as final by the supreme court, though not strictly final decrees under the judiciary act of 1789. But no order relating to such boundary is final until the whole matter is finally determined. *United States v. Fossatt*, 21 How., 445.

§ 50. It seems that an appeal cannot be prosecuted from a United States district court to a circuit court, except on a final decree; hence, if the appellant insisted on treating the decree below as interlocutory, it was held that the appeal must be dismissed. *Craig v. Steamer Hartford*,\* 1 McAl., 91.

§ 51. The decree of the appellate court of a state in a foreclosure suit reversing the decree of the court below in favor of the complainant, and remanding it for such further proceedings "as to law and justice shall appertain," is not a final decree within the meaning of the judiciary act. *Moore v. Robbins*, 18 Wall., 588; *St. Clair Co. v. Livingston*, id., 628.

§ 52. A decree in a foreclosure suit is not final where the amount due, and the property to be sold, remains to be ascertained. *Railroad Co. v. Swasey*, 28 Wall., 405.

§ 53. In a suit to cancel a deed and to compel specific performance of a contract, or to compel certain payments, the court held that it would not cancel the deed or compel specific performance of the contract, and that, as the proper parties were not before the court, it would not then proceed further. *Held*, that this was not a final decree, and that other parties having been brought in and a decree rendered, the whole matter was subject to examination. *Crosby v. Buchanan*, 23 Wall., 420.

§ 54. A decree that money shall be paid into court, or that property shall be delivered to a receiver, or that property held in trust shall be delivered to a new trustee appointed by the court, is interlocutory only; and no appeal lies therefrom. *Forgay v. Conrad*, 6 How., 201.

§ 55. In chancery a decree is interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision. *Beebe v. Russell*, 19 How., 288.

§ 56. A decree in a suit for an infringement which awards the complainant a perpetual injunction, and gives him an accounting for the rents and profits, and refers the cause to a master for that purpose, is not a final decree. *Humiston v. Stainthorp*, 2 Wall., 106.

§ 57. When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. Hence, where a case was referred to a master to take an account of rents and profits, etc., upon evidence, and from an examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his results to the court, this was not a final decree. *Beebe v. Russell*, 19 How., 288.

§ 58. A decree of the supreme court of the District of Columbia, setting aside a previous decree confirming a sale, and directing a resale, is not a final decree. *Butterfield v. Usher*, 1 Otto, 246.

§ 59. A judgment of a circuit court reversing that of a district court and ordering a new trial is not final, and no appeal lies therefrom. *Baker v. White*, 2 Otto, 176.

§ 60. An interlocutory order or decree is one made pending the cause, and before a final hearing on the merits. An order allowing the filing of a plea of settlement in bar is interlocutory, and not final, as is also an order dissolving an injunction. *Chouteau v. Rice*,\* 1 Minn., 24.

§ 61. Where the United States circuit court decreed that the complainants were entitled to two-sevenths of certain property, and referred the matter to a master in chancery to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the master's report, this was not such a final decree as can be appealed from to the supreme court of the United States. *Perkins v. Fourniquet*, 6 How., 206.

§ 62. A decree of the United States circuit court, setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; and directing an account to be taken of these last-mentioned sums in order to a final decree, is not such a final decree as can be appealed from to this court. *Puliam v. Christian*, 6 How., 209.

§ 63. The certificate of the finding of a jury, transmitted by the circuit court of the District of Columbia to the orphans' court, was not such a final judgment, order or decree as is included within the statute (2 Stats. at Large, 103). After the reception of the certificate, the orphans' court had still to pass a decree in order to settle the rights of the parties. *Van Ness v. Van Ness*, 6 How., 62.

§ 64. An order of the district court sustaining a demurrer to a petition, because it was multifarious, and because the names of the persons claiming or in possession of the land which the petitioners alleged to belong to them were not set forth, was not a final judgment or decree from which an appeal lies to this court. *De Armas v. United States*, 6 How., 108.

§ 65. In admiralty.—In admiralty no decree can be rendered on the proofs alone, when the subject-matter of these proofs is not essentially alleged in the pleadings. *Davis v. Leslie*, Abb. Adm., 128.

§ 66. It is not necessary for the successful party to serve upon the other a notice of the rendition of an entry of a decree in admiralty. *Gaines v. Travis*, Abb. Adm., 423.

§ 67. Every decree in admiralty is treated, after it has been approved, as enrolled of the term at which it was made. *The Steamboat New England*, 3 Sumn., 496.

§ 68. A decree of a district court in admiralty is made of no effect by an appeal therefrom to the circuit court when security for damages is given on the appeal, though not given till execution has issued on the decree and a levy has been made. *Dutcher v. Woodhull*, 7 Ben., 318.

§ 69. A decree in admiralty is the judgment of the court on the subject in controversy, submitted by the pleadings, and must correspond with and apply to that issue. *The Steamboat Pacific and the Brig Fashion*, Newb., 41; *Brig Fashion v. Ward*, 6 McL., 195.

§ 70. A decree in admiralty dismissing a cross-libel in a collision case determines the fact that the defendant in the original suit is not entitled to affirmative damages for any injury received, but it does dispose of the issues of law or fact involved in the original suit. Both parties to the cross-suit, if no appeal is taken therein, are remitted to the pleadings in the original suit, and every issue in those pleadings is open to the parties just the same as if no cross-libel had ever been filed. *The Dove*, 1 Otto, 381.

§ 71. Where a decree is made dismissing a libel in admiralty, "without costs to either party," it merely imports that the parties are not liable to each other for any costs, but does not affect the liability of a party to the clerk for his fees for services rendered to such party. In the *Matter of Stover*, 1 Curt., 201.

§ 72. In a suit in admiralty *in personam*, no personal judgment will be rendered if the defendants are not in the district and have not appeared. The judgment will only go against the property attached. *Boyd v. Urquhart*, 1 Spr., 423.

§ 73. When a recovery in damages is sought in cases of collision between two vessels, and the proof exhibits faults in both, or faults in neither, and the libel is dismissed, the decree need not set forth the ground assumed by the court, unless the pleadings presented such an issue. Especially will such course be avoided in framing the decree, if the court is apprised that the same matter is litigated between the same parties in another district. *The Steamboat Pacific and the Brig Fashion*, Newb., 41; *Brig Fashion v. Ward*, 6 McL., 195.

§ 74. A commissioner, in making an award in a libel in admiralty, in addition to damages for repairs, allowed also a claim for demurrage. The court, in passing on this award and in striking out the item for demurrage, remarked that "the result would be about just between the parties on the whole case." *Held*, that this was not deciding that demurrage was not a proper item to be allowed in the computation of damages. *Sturgis v. Clough*,\* 1 Wall., 269.

§ 75. Although from the language contained in the decree in question an erroneous inference might have been drawn, yet such decree was nevertheless affirmed. *Ibid*.

§ 76. — final decrees.—A decree in admiralty which disposes of the whole matter in controversy as to a given claim; which is final so far as the claimants and their rights are concerned as to the United States; which leaves nothing to be litigated between the parties, and awards execution in favor of the libelants and against the claimants, is final. *Withenburg v. United States*, 5 Wall., 819.

§ 77. A decree in admiralty is final when it disposes of all matters in controversy, leaving nothing further for the court to do in the cause; as where there is a decree for a sum certain, with or without costs, or where the libel is dismissed with or without costs. If the decree shows there is something more to be done by the court before the rights of the parties are fixed and determined, then the decree is interlocutory, though disposing of the merits. A decree that disposes of the rights of the parties and the subject-matter, and directs that execution issue and that the proceeds be returned to the clerk and by him distributed, is final. *Sloop Leonede v. United States*,\* 1 Wash. T'y, 174.

§ 78. On appeal to the circuit court in an admiralty case it was decreed that the appellees recover judgment against the appellants for a sum named, and that unless an appeal was taken a summary judgment be entered against the stipulators on the appeal. An appeal was taken to the supreme court, which affirmed the decree, and the case was remanded with directions that such execution and proceedings be had in said cause as according to right and justice, etc., ought to be had. *Held*, that as to the sureties the judgment of the circuit court was not final, and that the whole matter was within the power of the circuit court under the man-

date, and that it could in its discretion refuse to award execution against the sureties. *Ex parte Sawyer*, 21 Wall., 235.

§ 79. A decree awarding a certain rate of salvage of the proceeds, after deducting charges and expenses, and fees of court, is not a final decree; but at most is only an interlocutory decree, in the nature of a final decree. *The Steamboat New England*, 8 Sumn., 493.

§ 80. In admiralty a decree is not final while the cause is pending on appeal in the supreme court. And any statute which governs the case must be an existing valid statute at the time of affirming the decree below. It was so held where the state of Louisiana claimed the proceeds of certain persons of color found on board a vessel condemned for violation of the slave trade law, and the act under which the state claimed was repealed before the final condemnation in the supreme court. *United States v. Preston*,\* 8 Pet., 57.

§ 81. — conclusiveness.— A condemnation of a prize in a court of admiralty is binding and conclusive against all the world. *Juando v. Taylor*, 2 Paine, 652.

§ 82. The question whether there was a justifiable cause of seizure having been decided in the proceedings *in rem*, and the decree of acquittal not having been appealed from with effect, the decree is conclusive evidence in every inquiry before every other tribunal, that there was no such cause of seizure. *The Appollon*, 9 Wheat., 862.

§ 83. A decree of a court of admiralty on a proceeding *in rem* for a forfeiture is conclusive on all persons claiming an interest in the thing. *The Mary Anne*, 1 Ware, 104.

§ 84. While in a personal action it is necessary, in order to bind the defendant or to give the plaintiff any rights, that the defendant must be served with notice of the institution of the suit, in order that he may defend, yet judgments *in rem* are conclusive upon the property seized and upon all persons, both when directly and collaterally involved. *The Globe*, 2 Blatch., 427.

§ 85. If a ship is seized under usurped authority, and recaptured by her crew, they are entitled to salvage; and the decree of an American court *in rem* will be deemed conclusive on the right, unless fraud is shown. *Williams v. Suffolk Ins. Co.*, 8 Sumn., 270.

§ 86. A decree and finding in a suit in admiralty, that a vessel is a foreign one and not liable to the claim for which she is libeled, is conclusive on the claimants, though such decree is rendered on appeal after the vessel was improperly removed from the custody of the court. *The Rio Grande*, 23 Wall., 458.

§ 87. The doctrine that a decree in admiralty *in rem* is evidence as against all the world, and binding even on those who were not parties to it, is confined to civil cases; and in civil cases even it is confined to those who have a direct interest in the condemnation or acquittal of the vessel libeled, and who may, if they choose, make themselves parties. The rule is never applied in criminal actions or in suits for penalties. *Allen v. United States*, Taney, 112.

§ 88. In a suit for the price of a cargo of coal sold by the plaintiffs to the defendant, it was held that a judgment of the district court rendered in favor of the master of the vessel on a libel filed by him against the cargo, for damages in the nature of demurrage for the improper detention of the vessel through the fault of the plaintiffs, which judgment was paid by the defendant, was conclusive as between the plaintiffs and defendant of the validity of the claim for demurrage and the amount of damages, the plaintiffs having had notice of that suit. *Audenreid v. Woodward*,\* 4 Fed. R., 173.

§ 89. So long as the sentence of a court of admiralty remains in force, unreversed by a superior tribunal, it is conclusive to work a change of the property. *Armroyd v. Williams*,\* 2 Wash., 511.

§ 90. Our admiralty courts, in prize cases, will not depart from the established law of nations, for the purpose of retaliating upon foreign courts their own rule in such cases. *Ibid*.

§ 91. Parties.— All persons in interest must be made parties to proceedings in equity before a decree. *Hoxie v. Carr*, 1 Sumn., 173.

§ 92. An interlocutory decree disposing to a great extent of the merits of the case should not be rendered till all necessary parties are before the court. *Conn v. Penn*, 5 Wheat., 424.

§ 93. A decree may be made as between defendants. The court can only decree as between parties to the suit, but in equity it is not essential, as at law, that the parties litigant should all be on opposite sides of the case. *Piatt v. Oliver*, 3 McL., 27.

§ 94. Neither the act of congress of 1849 (5 Stat. at Large, 321, § 1), nor the forty-seventh rule for the equity practice of the United States circuit courts, enables a circuit court to make a decree in equity, in the absence of an indispensable party whose rights must necessarily be affected by such decree. *Shields v. Barrows*, 17 How., 130.

§ 95. In proceedings against an insolvent bank, a decree which among other things exonerates shareholders from liability is to that extent improper where the shareholders were not joined as parties. *Terry v. Commercial Bank, etc.*, 2 Otto, 454.

§ 96. Where the legal title of property is held in trust for the benefit of another, it cannot

be discharged of the trust by a decree against the *cestui que trust* when the trustee is not joined. *O'Hara v. MacConnell*, 8 Otto, 150.

§ 97. If a decree can be made without affecting the rights of a person not made a party, or without his having anything to perform, necessary to the perfection of the decree, the court will proceed without him, if he be not answerable to the process of the court, or no beneficial purpose is to be effected by making him a party. *Joy v. Wirtz*, 1 Wash., 517.

§ 98. Several defendants.—Where an action was brought against several as joint promisors, before the code, judgment could not be rendered against one of them separately. *Carlton v. Patch*,\* 1 Minn., 102.

§ 99. In an action on a joint contract against two, where one has suffered a default, and the other has obtained a verdict, judgment must be entered up for both. *Champlin v. Tilley*,\* 3 Day (Conn.), 807.

§ 100. A complainant in a court in Louisiana asked a judgment against the defendants *in solido* for a partnership debt, but the pleadings and proofs showed that there was not a commercial but an ordinary partnership existing between them. Held, the judgment against each of the defendants for his share of the indebtedness was valid. *Beauregard v. Case*, 1 Otto, 184.

§ 101. Where several defendants are named as belonging to a company, judgment may be rendered against them individually if the jury find they are individually liable, though they are not in fact members of the company. *Comanche Mining Co. v. Rumley*,\* 1 Mont. T'y, 201.

§ 102. Under the law of Louisiana a suit may be brought and judgment rendered against a person in several capacities as executrix, as a widow in community and as tutrix of her minor children, and in a suit so brought judgment may be rendered against the minor heirs individually, and costs may be decreed against her and the minors *in solido*. *Kitteredge v. Race*, 2 Otto, 116.

§ 103. Under the statute of Arkansas, which is applied by federal courts sitting therein, a several judgment may be rendered against one of several defendants sued and summoned jointly, where such a judgment could have been rendered against him had he been sued alone. *Sawin v. Kenny*, 3 Otto, 289.

§ 104. In an action on a joint and several bond against several defendants, some of whom are non-residents of the state in which suit is brought, and there is a return of "no inhabitants" as to them, the plaintiff may proceed to take judgment against those on whom process has been served. *Pegram v. United States*, 1 Marsh., 261.

§ 105. Where a judgment has been rendered against two defendants, the judgment, if void as to one, is void as to both. *Shuford v. Cain*, 1 Abb., 302.

§ 106. In debt on a joint and several bond given for duties, it is no objection, in a several action against one of the obligors, that a co-obligor has been taken in execution on a judgment on the same bond and discharged under the act of congress of June 6, 1798, chapter 66. *Hunt v. United States*, 1 Gall., 81.

§ 107. If several damages be assessed upon a writ of inquiry on a judgment by default in an action of assault and battery, against two, the plaintiff may enter a *nolle prosequi* against one and take final judgment against the other. *Conner v. Cockerill*, 4 Cr. C. C., 3.

§ 108. Deceased partner—Insolvency of survivors.—In a bill in equity to obtain satisfaction of a joint debt out of the estate of a deceased partner, on account of the insolvency of the survivors, no decree need be had against the survivors, although they may be liable to pay the debt, their insolvency being apparent. *Van Reimsdyk v. Kane*, 1 Gall., 630.

§ 109. Warrant of distress.—A warrant of distress, under the provisions of the act of May 15, 1820, has the effect of a judgment. *Armstrong v. United States*, Gilp., 399.

§ 110. Allegations—Proof.—The decree must conform to allegations in the pleadings as well as to proofs in the cause. *Crocket v. Lee*, 7 Wheat., 522.

§ 111. A decree must be according to the *allegata* as well as the *probata*. *Hastings v. Granberry*, 3 Cr. C. C., 819.

§ 112. A decree must be in consonance with the pleadings and proofs in the cause. *The Steamboat Rhode Island, Olc.*, 505.

§ 113. Where the allegations in a bill are so defective or vague that a precise decree cannot be rendered upon them, proof must necessarily be adduced before a decree can be made. *United States v. Samperyac*, Hemp., 119.

§ 114. Where there is a supplemental decree purporting to be by consent, entered after the case had been ended, and the term of court adjourned, such decree is void, because there are no allegations to support it. Besides, it was made after the rights of the parties had been fully determined, and as some of the parties interested were not parties to the proceedings, their interests were not affected. *Kinney v. Con. Virginia M. Co.*, 4 Saw., 882.

§ 115. A decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, and cannot be founded upon a fact not put in issue by the pleadings. *Carnel v. Banks*, 10 Wheat., 181.



§ 116. A complainant is not entitled, under the prayer for general relief, to a decree inconsistent with his own statement in his bill. *Connolly v. Belt*, 5 Cr. C. C., 405.

§ 117. *Rendering judgment.*—The rendering of a judgment is a judicial act, and must be done by the court, and the record must show that it is the judgment of the court. *Goddard v. Coffin*, Dav., 381.

§ 118. Judgment cannot be rendered on imperfect special verdict or case stated. *Graham v. Bayne*, 18 How., 60.

§ 119. — *by one surety against another.*—Judgment will not be rendered on motion of one surety against another, unless the insolvency of the principal be fully proved. *White v. Perrin*, 1 Cr. C. C., 50.

§ 120. *Form of judgment.*—Judgment may be given for interest from the maturity of the note, or in damages. Either mode is regular. *Archer v. Morehouse*, Hemp., 184.

§ 121. *Entering judgments.*—A judgment in vacation may be entered as of an ensuing term, but not *nunc pro tunc* as of a past term. *Puget Sound Agr. Co. v. Pierce County*,\* 1 Wash. Ty, 83.

§ 122. When it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold or silver, damages should be assessed, and judgment rendered accordingly. *Butler v. Horwitz*, 7 Wall., 258. Followed, *Dewing v. Sears*, 11 id., 379.

§ 123. When contracts payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgments may be entered generally without such specification. *Bronson v. Rodes*, 7 Wall., 229. Followed, *Dewing v. Sears*, 11 Wall., 379.

§ 124. The parties having stipulated that the determination of a referee should have the same effect as a judgment of the court, and the court having ordered that on filing the report with the clerk of the court judgment should be rendered, it was held that a judgment on the referee's report, entered by the clerk on the filing of the report, was properly entered. *Heckers v. Fowler*, 2 Wall., 123.

§ 125. Where the state practice permits, judgment may be entered upon the report of a referee without application to the court. *Fourth National Bank of Chicago v. Neyhardt*, 18 Blatch., 393.

§ 126. A judgment in an action of debt for duties, which provides that it is "payable in gold and silver coin for duties," is proper, though the words "for duties" are unnecessary. *Cheang-Kee v. United States*, 8 Wall., 320.

§ 127. Under a law authorizing property attached to be released upon the execution of a delivery bond which shall take the place of the property for which it is substituted, and which shall be filed in court and constituted a part of the record, and authorizing a judgment to be entered thereon against the principal and surety, in the event of a recovery in the attachment suit, without *scire facias* or notice, a person executing such a bond places himself in court and agrees that judgment may be rendered against him without further process. *Kuhn v. McMillan*,\* 3 Dill., 372.

§ 128. It is held that a stipulation as to the non-residence of a defendant will not overcome a record of a judgment entry treating the defendant as in court. *Ibid.*

§ 129. If, after verdict, there is any rule or order, general or special, for judgment *nisi*, no new motion being made, the party in whose favor the verdict is is entitled to judgment. *Goddard v. Coffin*, Dav., 381.

§ 130. No actual, formal entry of judgment, on any docket or other paper, need be made by either court or prothonotary, to justify the issue of final process, as on a judgment. If the party himself, prior to the precept for final process, has signed a paper meant to authorize such entry, it is enough. The clerk may enter judgment on his docket, or make up a formal record at any time afterward. *Cromwell v. Bank of Pittsburgh*, 2 Wall. Jr., 569.

§ 131. A judgment was entered in consequence of the expiration of a stay of proceedings given to the defendants to make a case on which to move for a new trial. Afterwards, during the same term, an order was entered, on motion of the defendants, vacating the judgment on payment of the costs that had previously accrued, and also upon condition that the case should be settled in a certain time and the motion made for a new trial, with liberty to either party to turn the case into a bill of exceptions. The case was accordingly settled, the motion for a new trial heard and denied, and a bill of exceptions settled and signed. Afterwards the plaintiff issued execution on the judgment, claiming it to be still in force, on the ground that the condition in respect to the payment of costs had not been complied with. On a motion of the defendants, this execution and the aforesaid judgment were set aside unconditionally. The ground upon which this was done was that the plaintiff, by not making out his bill of costs, procuring a taxation and demanding them previous to the hearing of the motion for a new trial, thereby impliedly consented to waive this condition, and could not afterwards set it

up for the purpose of invalidating the order vacating the judgment. On a motion for a *mandamus* to compel the court to vacate the order vacating the judgment, the supreme court sustained the action of the lower court and denied the motion. The supreme court also expressed themselves as satisfied, from the proceedings below, that it was the understanding of both parties that the original judgment was to be considered as vacated, and that a new one be entered for the plaintiff, if a motion for a new trial was desired. *Ransom v. City of New York*,\* 20 How., 581.

§ 182. A federal judge tendered his resignation, under the act of April 10, 1869, providing for the retirement of judges over seventy years of age, after ten years of service, "for the purpose of enjoying the privileges of said act, and not otherwise." Subsequently, and prior to the appointment of his successor, he signed the decree in question. *Held*, the decree was valid. *Northrop v. Gregory*,\* 2 Abb., 503.

§ 183. When a transcript of a record of another court was attached to the answer as an exhibit, and portions of it particularly referred to, and the record of the entire case pleaded, a decree, certified by the clerk, which had been executed by the parties, must be considered as a part of the record, although it had not the signature of the judge. The signature of the judge is not the only evidence by which a decree can be authenticated. *Secombe v. Steele*, 20 How., 84.

§ 184. — *In replevin*.—Where judgment is to be entered up for the defendant in an action of replevin, it should be for a return. *Hemstead v. Colburn*, 5 Cr. C. C., 655.

§ 185. — *and recording*.—The federal courts, in pursuance of acts of congress, recognize and follow the laws of the states in regard to the entering and recording of judgments and their liens. They are rules of property which the federal courts must observe. *Bonnell v. Weaver*, 5 Biss., 22 (§ 1879).

§ 186. All decrees in United States courts are deemed to be enrolled at the term in which they were passed. *Dexter v. Arnold*, 5 Mason, 303.

§ 187. When decree takes effect.—A decree of a court in a trial without jury does not take effect until entered of record. Thus, where a court decided on the 21st of June that the election of directors of a certain mining company was illegal and void, and the decree was dated on the same day, but not filed with the clerk until the 22d of June, it was held that the directors thus ousted were officers *de facto*, and capable of acting as such until the decree was filed June 22d. *Anglo-Cal. Bank v. Mahoney M. Co.*, 5 Saw., 255.

§ 188. A decree having been ordered was not actually entered till some time later, when it was entered *nunc pro tunc*. *Held*, that the date of the decree was the date of actual entry, and not the date of the order. *United States v. Gomez*, 1 Wall., 690.

§ 189. Where a party dies during term, the judgment may be entered in a United States circuit court as of a day antecedent to his death. *Griswold v. Hill*, 1 Paine, 483.

§ 140. For what amount given.—A judgment cannot be given for a greater sum than that claimed in the declaration. *Hogan v. Taylor*,\* *Hemp*, 20.

§ 141. Form of judgment.—The plaintiff in a suit to recover land averred that he claimed and was entitled to possession. The defendant denied the allegation of this right, but set up no title in himself. On this issue judgment was rendered for the plaintiff. The supreme court reversed this, and sent down a mandate "to enter judgment for the defendant." The trial court then entered judgment that the plaintiff had no title and that he should pay the costs. Two years later the same court, at the instance of the plaintiff, set aside this judgment and granted him a new trial; and the next year the suit was, on his motion, dismissed and a judgment rendered against him for costs. The supreme court then issued a *mandamus* commanding the lower court to vacate the order granting a new trial, and to enter judgment in favor of the defendant according to the mandate sent down upon the reversal. The lower court then entered a judgment that the defendant had right to the land and to the possession thereof. On exception to this judgment it was held that it was erroneous in so far as it determined that the defendant had such title, and that it should have been, like the prior judgment, simply in favor of the defendant upon the issue joined. *Litchfield v. Railroad Co.*,\* 7 Wall., 270.

§ 142. Scope.—Where a decree limited the right of the complainant to recover bonds in possession of defendant to the time process was served, on motion subsequently made for rule to show cause why certain of the bonds, which the defendant had in his possession and had not accounted for, should not be delivered to the clerk, it was held that, as the bonds in question were acquired after the filing of the bill, the case was not within the scope of the decree, and the motion was denied. *Texas v. Chiles*,\* 10 Wall., 127.

§ 143. Where a judgment is rendered on the merits, whether on demurrer, agreed statement or verdict, it extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined in the course of the proceedings. *Aurora City v. West*, 7 Wall., 82.

§ 144. *Merger*.—A judgment is properly given for the debt and damages, the principal and interest, the whole sum then due. This is a merger of the debt, and thereafter the judgment bears interest or not, and at such rate as the statute may provide. It is error for the judgment to be rendered for the principal and interest then due, and then provide that a part thereof shall bear interest from a time anterior to the judgment. *In re Boyd*, \* 4 Saw., 262.

§ 145. A plaintiff is not allowed to split up various covenants or promises contained in one contract, and sue upon them separately; he can have but one recovery, and the contract becomes merged in the judgment of the court. *Chinn v. Hamilton*, Hemp., 438.

§ 146. A judgment upon a bond destroys the obligation of the bond, and the judgment becomes the debt. *United States v. Thompson*, \* Gilp., 614.

§ 147. A decree entered by consent which extends the time of payment of a mortgage debt and increases the rate of interest, but which expressly provides that the decree shall not operate a novation of the original mortgage or affect the validity of the same, does not merge the judgment therein, and the mortgage remains in full force. *Hunt v. Innis*, 2 Woods, 103.

§ 148. Where a deed of trust was executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment did not operate as an extinguishment of the right of the holders of the notes to call for the execution of the trust; although the act of limitations might apply to the judgment. *Bank of the Metropolis v. Gutschlick*, 14 Pet., 19.

§ 149. *Execution docket—Complete record*.—The execution docket required by paragraph 4 of section 267 of the code of Georgia, to be kept by the clerk, is the book intended by the law of Georgia to give notice of judgments. The complete record required by paragraph 6 of the same section for the "record of all proceedings in all civil cases within six months after the determination thereof," is not intended for that purpose. *Plant v. Gunn*, \* 7 Fed. R., 751.

§ 150. *Sale of judgment*.—The sale of a judgment in Louisiana under an execution issued upon a judgment rendered subsequently to an assignment of the first mentioned judgment, as security for a debt upon an agreement to pay over the balance after satisfying the debt, passes no title to the purchaser. *Stockton v. Ford*, \* 11 How., 282.

§ 151. An attorney having the charge and management of a judgment belonging to his client, for the purpose of its enforcement, who purchases such judgment under a judgment and execution against his client, will be held in equity as a trustee. *Ibid*.

§ 152. *Enforcing judgment or decree*.—A judgment creditor who applies to a court of equity for its aid to enforce a judgment at law, if he asks its aid to reach a chattel, must show that he has taken out execution at law, and pursued it to every available extent, in order to show a lien upon the chattel; but if the aid is sought as to land, it is enough to show a judgment creating a lien upon the land. *United States v. Sturges*, 1 Paine, 525.

§ 153. Where, by reason of the circumstances of the case, it has become impossible to carry a decree into effect without further interposition of the court, a bill may be filed to enforce the performance of such former decree. *Thompson v. Maxwell*, 5 Otto, 391.

§ 154. One of the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of its own passing or a foreign decree; and that notwithstanding the provision of the constitution giving the right of trial by jury. *Shields v. Thomas*, \* 18 How., 253.

§ 155. *Judgment of supreme court*.—The judgment of the supreme court upon an appeal to it will be enforced by the inferior court, except as its enforcement may be modified or restrained by events occurring subsequently to the period covered by the records upon which the supreme court acted. *South Fork Canal Co. v. Gordon*, 2 Abb., 479.

§ 156. *Restriction upon enforcement*.—Any restriction or condition that the court may impose upon the enforcement of a judgment, by a provision in the entry of the same, must be taken to be a part of its action in giving the judgment. If the effect be to modify or even nullify the right to recover, it can only be said that so far the court has not given any judgment. *In re Boyd*, \* 4 Saw., 262.

§ 157. *Constitutional right—Writ of error*.—A right arising under a judgment of the circuit court of the United States is a right under the constitution and laws of the United States, and within the twenty-fifth section of the judiciary act, allowing a writ of error to the supreme court of a state where the decision is against such a right. *Clements v. Berry*, 11 How., 398 (§§ 944-46).

§ 158. *Executing mandate*.—The United States supreme court having sent a mandate to a circuit court to put a party into possession of certain lands which were the subject of an ejectment suit, it was right in the circuit court not to extend the possession further than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy. *Walden v. Bodley*, 9 How., 31.

§ 159. The United States filed an information against certain cotton as liable to seizure and confiscation. The district court entered a decree against the petitioners for its value. The su-

preme court reversed this decree with directions to the district court to cause restitution to be made to the petitioners. The district judge having submitted himself to the supreme court for instructions in executing the mandate, it was held that the mandate must be obeyed as far as practicable; that all distributees within the territorial jurisdiction of the court, except the United States, must be required by the proper order to refund what they had received; that failing so to do they should be dealt with by attachment for contempt; that the court had no authority to order the United States, to whom a part had been paid, to refund; that no order could be made in relation to a distributee who was beyond the territorial jurisdiction of the court, but that one within the jurisdiction who had received his share for him should be ordered to disclose the facts touching the matter and refund the share, and that the distributee beyond the jurisdiction was amenable to a suit at law wherever he might be found; and further, that, as the marshal had deposited the share of the United States in a bank, the circumstances of this deposit should be inquired into, and if the money had been deposited in pursuance of instructions from the proper authority, the marshal should be exonerated, and a proper certificate given to the petitioners so that they could seek redress in the appropriate manner. *Ex parte Morris*, 9 Wall., 605.

§ 160. Service by publication.—In a suit commenced by attachment, where service is made by publication only, a sale under a general execution issued on the judgment of land not attached is void. *Morton v. Smith*, 2 Dill., 816.

§ 161. By statute in Ohio a proceeding in chancery against a non-resident is authorized by publishing notice, where the title or boundaries of land is in question, or to compel a specific execution of such a contract, or the rescission of a contract for the conveyance of land. This can only affect the land against which the proceeding is instituted, by being named in the bill. Hence, a decree for money on such a bill, if such decree be within the power of the court, cannot be made to affect the property of the defendant generally, or to render it liable for the satisfaction of the decree. *Boswell v. Dickerson*, 4 McL., 262.

§ 162. Recitals in decrees.—In Illinois a recital in a decree in partition proceedings, that due legal notice has been given to all the defendants, is *prima facie* evidence of that fact, though not conclusive. *Secrist v. Green*, 3 Wall., 751.

§ 163. A recital in a decree that it is rendered on consent of the solicitor of one of the parties is equivalent to an express finding that the solicitor had authority to do what he did. *Pacific Railroad v. Ketchum*, 11 Otto, 289.

§ 164. Costs.—A judgment which reads, "whereupon the court orders that plaintiff pay the costs of suit, and that execution issue therefor," is a sufficient judgment for costs. The costs need not be stated in the judgment, but may be taxed by the clerk from the record and papers on file. *Huntington v. Blakeney*, 1 Wash. T'y, 129.

§ 165. Ascertaining facts — Final decree.—A court of equity may ascertain the facts themselves, if the evidence enables them to do it, or may refer the question to a jury or to auditors. After an issue ordered, a court of equity may proceed to a final decree without trying the issue or setting aside the order. *Field v. Holland*, 6 Cr., 8.

§ 166. A *supersedeas* judgment must recite the original judgment correctly. *Holmes v. Bussard*, 2 Cr. C. C., 401.

§ 167. A judgment of the circuit court cannot be superseded without two sureties. *Mandeville v. Love*, 2 Cr. C. C., 249.

§ 168. A *supersedeas* judgment is absolutely void unless acknowledged by the original defendant and two sureties. *Smith v. Middleton*, 2 Cr. C. C., 233.

§ 169. Extraterritorial effect.—A decree in Virginia cannot operate on the title to land in Kentucky. But having jurisdiction of the person, the court may enforce its decree. *Carrington v. Brents*, 1 McL., 167.

§ 170. A court of chancery in any other state than that in which land is situate can make no decree which affects the title to such land. But having jurisdiction of the person of the owner of the land, the chancellor may decree a conveyance, and enforce the decree by attachment or otherwise. *Tardy v. Morgan*, 8 McL., 353.

§ 171. A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court. *Watkins v. Holman*, 16 Pet., 26.

§ 172. Judgments by default.—A judgment by default at the imparlance term in the county of Washington, D. C., is regular, the rule to plead having expired in the preceding vacation. *Linthicum v. Remington*, 5 Cr. C. C., 546.

§ 173. Although the term should continue beyond rule-day, the plaintiff is entitled to judgment by default, if the defendant did not plead by that day. *Fowle v. Bowie*, 3 Cr. C. C., 291.

§ 174. A final decree cannot be entered for want of appearance until the term of court next succeeding the day of default. *O'Hara v. MacConnell*, 8 Otto, 150.

§ 175. **Divided court.**—Where there has been a verdict, and a motion for a new trial has been made, on which the court is divided, the motion is overruled and no new trial is allowed. *Goddard v. Coffin*, Dav., 881.

§ 176. But whether judgment can be entered on the verdict or not depends on the state of the case when the motion is made. *Ibid.*

§ 177. If there be no general rule, and no special order has been made for judgment *nisi*, and the court is equally divided on a motion for a new trial, the case stands precisely as though no motion had been made. *Ibid.*

§ 178. In United States courts judgment is rendered only upon the motion of the prevailing party. If no motion is made, the case stops. And upon such a motion, the court being equally divided in opinion whether judgment should be rendered, it seems that nothing can be done but to dismiss the case without costs and without prejudice. *Ibid.*

§ 179. **Arrest of judgment.**—Judgment will not be arrested where no consideration is specially alleged, if the instrument declared on purports a consideration or shows upon its face that the *assumpsit* was for a valuable consideration. *Kemble v. Lull*, 8 McL., 272.

§ 180. A variance between the *capias ad respondendum* and the declaration is not aground for arresting the judgment. *Wilson v. Berry*, 2 Cr. C. C., 707.

§ 181. After bail given and plea pleaded, the defendant cannot arrest the judgment on the ground of misnomer. *Scull v. Bridle*, 3 Wash., 200.

§ 182. Judgment will not be arrested because the plaintiff's name is indorsed on the bill in blank. *Vowell v. Alexander*, 1 Cr. C. C., 83.

§ 183. It is no cause for arresting judgment that the jury have found the damages in pounds, when the damages in the declaration are laid in dollars. *Butts v. Shreve*, 1 Cr. C. C., 40.

§ 184. **Valid — Failure of record to show facts.**—Judgments of county courts in Virginia exonerating lands from delinquent taxes are valid though the record does not show all the facts required to give validity to the judgment, if it shows what the statute requires to be shown, viz., that the commonwealth was represented by counsel. *Harvey v. Tyler*, 2 Wall., 328.

§ 185. — **close of war.**—A decree at the suit of citizens of a northern state quieting title to land in Texas, rendered after the re-establishment of federal courts in Texas, is valid though rendered before the proclamation of the president announcing the close of the war in that state. *Masterson v. Howard*, 18 Wall., 99.

§ 186. — **bond for purchase money of slaves.**—A judgment rendered in Georgia in 1861 on a bond for the purchase money of slaves is valid, and may be enforced, notwithstanding a clause in the state constitution adopted in 1868 forbidding the general assembly to confer jurisdiction or authority to enforce any debt the consideration of which was a slave or slaves or the hire thereof. *French v. Tumlin*,\* 10 Am. L. Reg. (N. S.), 641; S. C., 14 Int. Rev. Rec., 140.

§ 187. An adjudication made by a Spanish tribunal in Louisiana is not void because it was made after the cession of the country to the United States, for it is historically known that the actual possession of the country was not surrendered until some time after the proceedings and adjudication in the case took place. It was the judgment of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, though ceded, was, *de facto*, in the possession of Spain and subject to Spanish laws. Such judgments, as far as they affect the private rights of the parties thereto, must be deemed valid. *Keene v. McDonough*, 8 Pet., 308.

§ 188. **Review.**—A federal court cannot review the decision of a state court upon a question as to the authority of the state court to amend its own executions. *Kent v. Roberts*,\* 2 Story, 591.

§ 189. The terms of a final judgment cannot be altered by the court in any material part except on a review or appeal, or writ of error, or rehearing allowed for sufficient cause. *Jenkins v. Eldredge*, 1 Woodb. & M., 61.

§ 190. **Reversal.**—At common law, if a judgment is reversed on error, the party shall be restored to all he has lost. *Biggs v. Blue*, 5 McL., 148.

§ 191. It is not usual to reverse the judgment passed upon matters of fact by a tribunal or officer having had opportunity for a personal examination of witnesses in each other's presence. *Holmes v. Dodge*, Abb. Adm., 65.

§ 192. A judgment manifestly erroneous will not be allowed to stand where a complete bar to it is found in the record, where the party who would profit by it has not been misled. *Eldred v. Bank*, 17 Wall., 545.

§ 193. — **dismissal, rendering decree ineffectual.**—A decree of a court of chancery is erroneous, which, after ordering certain acts to be done, to enable a party to execute certain duties assigned to him, dismisses the bill, as it puts the cause out of court and renders the decree ineffectual. *Greenleaf v. Queen*, 1 Pet., 138.

§ 194. — *in Louisiana.*—In Louisiana the supreme court of the state reviews the questions of fact as well as of law which are brought up from the courts below; and when it reverses a judgment upon either ground, it gives the judgment which the inferior court ought to have given. *Parks v. Turner*, 12 How., 89.

§ 195. — *bad count.*—Where there is a good and a bad count in a declaration, and it appears that the evidence was applied solely to the bad count, the judgment must be reversed. *Scull v. Roane, Hemp.*, 108.

§ 196. — *judgment must follow verdict.*—The rules of the common law require that the verdict must find the matter in issue between the parties, and the judgment must follow the verdict. If not, the judgment must be reversed. *Bennett v. Butterworth*, 11 How., 689.

§ 197. — *verdict subject to opinion of court.*—A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize a judgment for defendants unless the points and opinions of the court thereon are stated in the record. *Smith v. Delaware Ins. Co.*, 7 Cr., 435.

§ 198. — *special verdict.*—Where the facts found in a special verdict do not authorize a judgment in favor of the person for whom it is rendered, and the judgment declares that it is rendered for him on such special verdict and upon conceded and not disputed facts, it must be reversed where the record does not contain the evidence and there was no general verdict. *Hodges v. Easton*, 16 Otto, 408.

§ 199. — *erroneous judgment — Award.*—A judgment on an award rendered after the authority of the referee has expired is erroneous. *Hanner v. Coffin*,\* 1 Or., 99.

§ 200. — *judgment for more than debt stated.*—The petition by which a suit on a bond was instituted stated the debt to have been \$15,555.18. The verdict of the jury was for \$20,000, and upon this a judgment was entered up against the estate of two of the obligors in the bond, jointly and severally, for \$30,000, and a judgment against two of the legal representatives of one of the obligors for \$10,000 each. Upon no possible ground can this judgment be sustained. *Cox v. United States*, 6 Pet., 172.

§ 201. — *usury.*—A judgment in Arkansas territory for prospective and accruing interest at a greater rate than that allowed by the statutes of the territory was held erroneous and reversible. *Evans v. White, Hemp.*, 296.

§ 202. — *minor and feme covert.*—A decree is improper against a woman, shown by the bill to be a minor and a *feme covert*, if there has been no appearance, and no guardian *ad litem* has been appointed. *O'Hara v. MacConnell*, 8 Otto, 150.

§ 203. — *penal bond.*—On a penal bond with conditions, judgment should be rendered for the penalty, to be discharged by the payment of the damages assessed, and if not so rendered must be reversed. *Campbell v. Pope, Hemp.*, 271.

§ 204. A judgment against the sureties on a bond for a greater sum than the penalty therein was clearly erroneous. *Farrar v. United States*, 5 Pet., 372.

§ 205. *Affirmance.*—Under the laws of New Mexico a judgment of affirmance in an appellate court may be rendered against the appellant and the sureties on his appeal bond. *Moore v. Huntington*, 17 Wall., 417.

§ 206. *Void judgments.*—If a court-martial has not lawful cognizance of a proceeding its sentence is void. It gives no right. It bars no right. It binds nobody, and all concerned in executing it are trespassers. *Howe's Case*,\* 6 Op. Att'y Gen'l, 506.

§ 207. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to the respect of any other tribunal. So where, in confiscation proceedings, a monition and notice was published, and the owner appeared, but his answer was stricken out because it appeared that he was a rebel, and decree entered against him, it was held that the decree was void. *Windsor v. McKnight*, 8 Otto, 374.

§ 208. A stipulation in a judgment that interest thereon shall be compounded if not paid is void, but it does not make the judgment void as for usury. *In re Fuller*, 1 Saw., 243.

§ 209. In Illinois a judgment for taxes is fatally defective which fails to indicate by some mark, word or character the amount, in money, of the tax for which it was rendered. *Woods v. Freeman*, 1 Wall., 398.

§ 210. A bill being filed to compel the specific execution of a contract relating to land, where the defendants were out of the state, the court passed a money decree, and ordered the sale of other lands than those mentioned in the bill. *Held*, that the decree was void, and no title passed to the purchaser at the sale ordered by the decree. *Boswell v. Otis*, 9 How., 336.

§ 211. When a title is set up under a judgment on an attachment, although the affidavit on which the writ issued does not appear in the record, the judgment cannot be treated as a nullity. *Biggs v. Blue*, 5 McL., 148.

§ 212. A judgment rendered in Georgia during the continuance of the war of the rebellion

is not void by reason of the rebellion, the court having jurisdiction. *French v. Tumlin*,\* 10 Am. L. Reg. (N. S.), 641; S. C., 14 Int. Rev. Rec., 140.

§ 213. The inferior court of common pleas for the county of Hunterdon, in the state of New Jersey, in May, 1779, had a general jurisdiction in all cases of inquisition for treason; and its judgment, although erroneous, was not void, inasmuch as the court had jurisdiction of the cause; and such judgment, until reversed, cannot be disregarded. *Kempe v. Kennedy*, 5 Cr., 173.

§ 214. Penal bond — Verdict.—In an action upon a bond conditioned to pay money by instalments, if the verdict be rendered before all the instalments are due, the jury must find how much is due upon each instalment and when payable, as well those to become payable as those already payable. *Davidson v. Brown*, 1 Cr. C. C., 250.

§ 215. — breaches — Defense.—In the case of a judgment on a bond upon a *scire facias* suggesting breaches, the merits of the judgment cannot be inquired into for the purpose of furnishing a defense to the *scire facias*. *Pennock v. Gilleland*,\* 1 Pittsb. R., 87.

§ 216. Collector's bond.—To support a judgment on a collector's bond at the return term, it must appear by the record that the writ was executed fourteen days before the return day. *Dobyns v. United States*, 3 Cr., 241.

§ 217. The United States, in an action upon a collector's bond, cannot obtain judgment against the surety for more than the penalty of the bond. *United States v. Ricketts*, 2 Cr. C. C., 553.

§ 218. Bond to secure rent.—Judgment by motion, on notice, cannot be obtained upon a bond given to secure rent upon an attachment on a suggestion that the tenant is about to remove. *Simpson v. Iegg*, 3 Cr. C. C., 132.

§ 219. Discharge of principal — Ca. sa. — Sureties.—The discharge, by the secretary of the treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the right of the United States to proceed against sureties for the amount due upon the judgment and unpaid. *United States v. Stansbury*, 1 Pet., 578.

§ 220. Defendant — Judgment — Protection by.—A defendant who, acting *bona fide* and without connivance with the plaintiff to enable him to obtain a judgment, is compelled by that judgment to pay what a third person and not that plaintiff is entitled to, is protected by that judgment against the claim of the real owner, and the remedy of the latter is against the person who has unjustly received it. It was so held where a bankrupt sought by bill in equity to obtain payment of a legacy which his assignees in bankruptcy had already recovered by suit against the executor as belonging to them under the commission, the bankrupt being all the time cognizant of the suit by the assignees, and after opposing their adverse claim for a while having withdrawn from the contest. *Mayer v. Foulkrod*,\* 4 Wash., 503.

§ 221. Decree annulling lease and judgment — Third parties.—The La Crosse Railroad Company leased its road to A., and subsequently confessed judgment in his favor in a large sum. Afterwards B. obtained judgment against the same company, to enforce satisfaction of which by a sale of the road he filed his bill against the company and A., alleging a lack of consideration for the lease and judgment confessed, and praying their avoidance. The court thereupon decreed to the effect that the lease between the La Crosse Company and A. be "vacated, annulled and made void," and also that the judgment and all proceedings thereon be "vacated, annulled, made void and set aside." The Minnesota Company, by a purchase, succeeded to all the property, franchises and rights of the La Crosse Company. It and other parties interested filed bills against A., to whom B. had assigned his judgment, and who was still in possession of the road, and had received large sums of money therefrom, reciting that as the lease and confessed judgment hereinbefore mentioned were absolutely void, not only as against B., but also as between A. and the La Crosse Company, A. was bound to account for the money he had received while in possession of the road, and thereupon they prayed such an accounting and a certain application of those moneys. *Held*, that while it is true that courts of equity can decree between co-defendants upon proper proofs, and under pleadings which bring the respective claims and rights of such co-defendants between themselves before the court, yet in the case of the decree under consideration it must be regarded as having made void the arrangement between the company and A., only as against the judgment creditor, B., and not as having determined anything between those parties. *Graham v. Railroad Co.*,\* 3 Wall., 704.

§ 222. State courts — District of Columbia.—Congress, by the thirteenth section of the act of February 27, 1801, placed judgments and decrees thereafter to be obtained in the state courts of the state of which the District of Columbia had formed a part, on the same footing with judgments and decrees rendered before. *Van Ness v. Bank of the United States*, 13 Pet., 17.

§ 223. Effect of decree.—The decree of the supreme court of Ohio, by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those

to whom the deed was ordered to be made, such a legal title to the land to be conveyed by the deed as would have been vested by a deed of equal date. *Steele v. Spenber*, 1 Pet., 552.

§ 224. *Against executors and administrators.*—A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him. *Dickson v. Wilkinson*, 3 How., 57.

§ 225. Under the laws of Maryland, as in force in the District of Columbia, a judgment against an administrator who is ascertained to have no funds should only be entered for assets as they shall thereafter come into his hands. *Ingle v. Jones*, 9 Wall., 486.

§ 226. In a suit of the United States against the administratrix of a surety in a revenue bond, brought thirteen years after the breach, and twelve years after she had settled her administration account, without having had previous notice of the bond or forfeiture, she was held to be entitled to judgment on pleading want of assets and fully administered. *United States v. Primrose, Gilp.*, 58.

§ 227. If a judgment be rendered against one as executor who is not executor, it does not bind the estate of the testator, and an execution upon such a judgment could not legally be levied upon such estate. *Griffith v. Frazier*, 8 Cr., 9.

§ 228. In ejectment, where the property sought to be recovered is claimed by the United States on a title of record, there being grounds for assuming jurisdiction of the case, the court will not be deterred from proceeding to final judgment by the argument *ab inutile*, that the court would have no power to make good its judgment by final process. The court in such case will not imagine that its judgment would be resisted. (The *Arlington Case*.) *Lee v. Kaufman*, 3 Hughes, 36.

§ 229. Judgment in an action of ejectment does not suspend the operation of the statute of limitations. *Smith v. Trabue*, 1 McL., 87.

§ 230. *Infants—Guardian ad litem.*—A court of chancery will not decree against infants without full proof, though their guardian *ad litem* confess the ground of action. *Walton v. Payne*, 1 McL., 120.

§ 231. *Judgment must be given in money.*—As in the courts of the United States a judgment can only be given in money, no other recovery can be had upon a note for a certain sum of money to be paid in sugar than for the sum of money mentioned in the note. *Courtois v. Carpentier*, 1 Wash., 376.

§ 232. *Judgment a contract.*—It seems that when a judgment is rendered on a contract such judgment constitutes a contract, the nature and extent of the liability of which is judicially established. *Walker v. Powers*, 14 Otto, 245.

§ 233. *Demand for taxes.*—A collector of taxes must make a demand for taxes upon the owner of the land, before a judgment can properly be rendered against it. *Mayhew v. Davis*, 4 McL., 218.

§ 234. *Debt—Sum certain.*—To maintain an action of debt on a decree for money, the sum must be certain, or such as the court can make certain. *Bank of Circleville v. Iglehart*, 6 McL., 568.

§ 235. *Land titles.*—The adjudications of the board of commissioners for the settlement of private land titles in California, and of the district court on appeal from the decisions of the board, stand, so far as third parties are concerned, on the same footing as adjudications in ordinary proceedings in courts of law. *Lynch v. Bernal*, 9 Wall., 315.

§ 236. *Collateral attack.*—Where a record is introduced collaterally as evidence, from a court of general jurisdiction, and where from the face of the record it appeared that the court had jurisdiction, no evidence will be heard to contradict the record. *Lathrop v. Stewart*, 6 McL., 630.

§ 237. In the absence of fraud a court of equity cannot collaterally question the conclusiveness of a judgment at law. *Tilton v. Cofield*, 3 Otto, 163.

§ 238. Judgments of courts of general jurisdiction, however erroneous, cannot be questioned, when introduced collaterally, unless it can be affirmatively shown that they had no jurisdiction. *Harvey v. Tyler*, 2 Wall., 328.

§ 239. Whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed for error, or set aside in some direct proceeding for that purpose. *Ibid.*

§ 240. After judgment by default and execution issued thereon the judgment debtor applied by motion to be allowed to come in and interpose a defense, and the court granted an order to show cause, with a stay of proceedings under the executions until the hearing of the motion. The stay was afterwards modified so as to allow a levy to be made, and the first levy was made before proceedings in bankruptcy were instituted against the judgment debtor. The motion did not come to a hearing until after the bankruptcy, when leave to come in and defend was granted, but the answers served under the leave were struck out as sham and frivolous.



*Held*, that these proceedings did not vacate the judgment or impair the lien of the executions, but on the other hand estopped the judgment debtor or his assignees from questioning the validity of the judgments or the jurisdiction of the court rendering the same in any collateral proceeding. *Crane v. Penny*, 2 Fed. R., 187.

§ 241. A judgment which is regular on its face and does not of itself show any want of jurisdiction of the court over the person of the defendant cannot be collaterally questioned. *Lee v. Rogers*, 2 Saw., 549 (§§ 1348-51).

§ 242. A judgment on an offset in favor of a defendant, in an action against him by the United States, is conclusive on the United States as to the matters involved, and cannot be inquired into in the court of claims if the court had jurisdiction. *Tillou v. United States*,\* 1 Ct. Cl., 220.

§ 243. A judgment of allowance of a competent court cannot be inquired into, reinvestigated, or impeached collaterally, and can only be reinvestigated in the manner pointed out by law. *Campbell v. Strong*, Hemp., 265.

§ 244. A judgment cannot be collaterally questioned. It can only be impeached in a direct proceeding for that purpose. So where the collection of a judgment is sought to be enforced by *mandamus*, the application cannot be resisted on the ground that interest was improperly included in the judgment. *Supervisors v. United States*, 4 Wall., 435.

§ 245. An order of a county court having jurisdiction of the subject-matter, directing and licensing the sale of the land of a deceased person, is presumed to have been properly made and on sufficient evidence, and cannot be inquired into collaterally. *Jackson v. Astor*,\* 1 Pin. (Wis.), 137.

§ 246. The validity of a judgment sustained when attacked collaterally. *Lonerger v. Fenelon*,\* 7 Pittsb. R., 266.

§ 247. At common law, the civil rights of a party injured by a felonious act are only suspended until the rights of the government to punish it criminally have been satisfied. But a verdict and judgment thereupon are conclusive as to the fact, in a suit upon any collateral matter connected therewith. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

§ 248. An assessment upon stockholders of a bankrupt corporation, made by a bankrupt court having jurisdiction thereof, cannot be attacked collaterally, but it is conclusive as to the stockholders' liability. *Michener v. Payson*,\* 13 N. B. R., 49.

§ 249. In every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until reversed by a superior tribunal, and it cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. *Cocke v. Halsey*, 16 Pet., 71.

§ 250. A decree or judgment of a court having jurisdiction is binding until reversed, and cannot be collaterally attacked. *Mitchell v. St. Maxent*, 4 Wall., 237 (§§ 1479-80).

§ 251. The decree or judgment of a court which has jurisdiction of the person and subject-matter is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until set aside by the proper appellate tribunal. And although the judgment or decree may be reversed, yet all rights acquired at a judicial sale, while the decree or judgment was in full force and which it authorized, will be protected. *Gray v. Brignardello*, 1 Wall., 627.

§ 252. The judgment of a New York court, dismissing a petition by a woman for a divorce upon the ground that she was not lawfully the wife of the defendant, was held by the United States circuit court in Wisconsin to be conclusive of that fact in proceedings setting up claims as widow. (Per MILLER, J. It seems that DRUMMOND, J., was of the opinion that fraud might be shown in the proceedings in the New York court. See 3 Biss., 272, note.) *Amory v. Amory*,\* 3 Biss., 266.

§ 253. A decree in a creditor's bill divesting a debtor of property conveyed by him in fraud of his creditors cannot be collaterally questioned, and a purchaser of the debtor's homestead, included therein, gets a valid title, which would not be divested by the reversal of the decree. *Miller v. Sherry*, 2 Wall., 237.

§ 254. Whenever the parties to a suit, and the subject-matter of the controversy between them, are within the regular jurisdiction of a court of equity, the decree of that court, solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law upon parties and their interests regularly within its cognizance. *Pennington v. Gibson*, 16 How., 65 (§§ 1283-85).

§ 255. Service of process.—Where a statute authorizes service of summons to be made by any person except a party to the action, a judgment rendered upon service of process by a party to the action cannot be impeached collaterally by either the parties or strangers. Such a service shows only a defect in obtaining jurisdiction, and not a want of jurisdiction. It is presumed that the court which rendered the judgment passed upon the sufficiency of the service. *Owens v. Gotzian*,\* 4 Dill., 436.

§ 256. The statutes of Oregon having provided that the affidavit for publication of notice to a non-resident defendant should show certain facts "to the satisfaction of the court or judge," it was held that defects in such affidavit must be taken advantage of by appeal or some direct proceeding, and could not be set up to affect the judgment collaterally. *Pennoyer v. Neff*, 5 Otto, 714.

§ 257. When a judgment is brought collaterally before the court as evidence, it may be shown to be void upon its face by a want of notice to the person against whom it was rendered, or for fraud. *Webster v. Reid*,\* 11 How., 437.

§ 258. Where a statute authorizes judgment on notice by publication, it may be shown that notice was not given as required by the statute, when such judgment is offered in court as evidence of a title. *Ibid*.

§ 259. With a view to a settlement of a large tract of land owned by half-breed Indians in Lee county, Iowa, to settle the claims to those lands, partition them among the claimants, or make sale thereof for the benefit of such claimants, congress passed an act on January 16, 1868, under which commissioners were appointed to carry out the objects of the act. These commissioners were authorized by the act to bring suit for their services as such officers against the owners of said "half-breed lands," and the words "owners of the half-breed lands lying in Lee county" were declared to be a sufficient description of the defendants in such suits, and service by publication was authorized as sufficient. Two judgments were obtained to satisfy the claims of two of these commissioners, and the entire reservation, containing one hundred and nineteen thousand acres, was sold to satisfy these judgments. *Held*, that the judgments were nullities, as having been rendered without legal notification of the suits, and did not authorize the executions on which the land was sold. *Ibid*.

§ 260. — Jurisdiction. — The rule that where a court has once acquired jurisdiction it has the right to decide every question which arises in the case, and that its judgment, however erroneous, cannot be collaterally assailed, applies only to cases in which the court proceeds after acquiring jurisdiction, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. *Windsor v. McVeigh*, 8 Otto, 274.

§ 261. The judgment of every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created, is final; and even where there is such an appellate power, its judgment is conclusive where it only comes collaterally in question, so long as it is unreversed. But directly the reverse is true in relation to the judgment of any court acting beyond the pale of its authority. *Wilcox v. Jackson*, 13 Pet., 498.

§ 262. When attacked collaterally, it is not enough that the record does not show jurisdiction, but on the contrary it must affirmatively show that the court did not have jurisdiction, or the decree will be valid until reversed on appeal, or vacated in some direct proceeding taken for that purpose. *Galpin v. Page*, 1 Saw., 309.

§ 263. The recital of a jurisdictional fact, where the record shows nothing to the contrary, is conclusive in a collateral attack although the record is entirely silent as to the evidence on which the fact was found. *Ibid*.

§ 264. In a collateral attack on the validity of a decree of condemnation in confiscation proceedings, no error can be considered which does not go to show a want of jurisdiction in the court rendering it. *Tyler v. Defrees*, 11 Wall., 331.

§ 265. Neither orders summarily given upon petition in chancery, nor decrees in suits upon bill filed, can be summarily reviewed as a whole in a collateral way; but it is a well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceedings. *Williamson v. Berry*, 8 How., 495.

§ 266. When the jurisdiction of a tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding. *Otis v. The Rio Grande*, 1 Woods, 279.

§ 267. On the collateral attack of a judgment, the inquiry into the jurisdiction of the court is not limited to an inspection of the judgment roll. *Galpin v. Page*, 8 Saw., 93.

§ 268. A judgment in condemnation proceedings under the right of eminent domain, rendered by a competent court charged with a special statutory jurisdiction, where all the facts necessary to this exercise of jurisdiction are shown to exist, can no more be impeached in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. *Secombe v. Railroad Company*, 23 Wall., 108.

§ 269. — errors or irregularities. — When a judgment is used as evidence its irregularity cannot be inquired into. *Platt v. Oliver*, 2 McL., 267.

§ 270. Where special and inferior tribunals have acquired jurisdiction, their subsequent

proceedings cannot be collaterally questioned for mere error or irregularity. *Lynch v. Bernal*, 9 Wall., 815.

§ 271. When the jurisdiction of a court of limited and special authority appears upon the fact of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. *Coinstock v. Crawford*, 3 Wall., 396; *Beard v. Federy*, 3 Wall., 478.

§ 272. A decree in partition cannot be collaterally attacked for errors or irregularities. *Parker v. Kane*, 22 How., 1.

§ 273. Where a court-martial has jurisdiction over the person and the case, its proceedings cannot be collaterally impeached for any mere error or irregularity committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other tribunals. *Ex parte Reed*, 10 Otto, 13.

§ 274. In a collateral proceeding to set aside a judicial sale, mere errors and irregularities in the original proceeding will not suffice. It must be shown that the court had no jurisdiction. *Ludlow v. Ramsey*, 11 Wall., 581.

§ 275. If a court had jurisdiction to make a decree which it has made, such decree cannot be collaterally attacked for errors and irregularities. *Otis v. The Rio Grande*, 1 Woods, 279.

§ 276. If the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceeding void; nor can such error be considered when the judgment is brought collaterally into question. *McGoon v. Scales*, 9 Wall., 28.

§ 277. Where proceedings on an attachment are erroneous, it may be a ground for reversal, but when the judgment is used collaterally such errors do not make void the judgment. *Biggs v. Blue*, 5 McL., 148.

§ 278. After a decree or judgment by a court of general jurisdiction, the presumption is that the court had jurisdiction, and that the proceedings were regular. The presumption of jurisdiction arising from the fact that a decree was rendered is not conclusive, however. Where a decree of foreclosure is rendered, and a sale of property has been made thereunder, it cannot be attacked collaterally, and the title thus acquired overthrown, except on the ground that the court rendering the decree had no jurisdiction. If it had jurisdiction, no irregularity can affect the title of a purchaser under the decree, even though the error or irregularity may be such that a revisory court on appeal would have reversed the decree. *Smith v. Pomery*, 2 Dill., 414.

§ 279. — *waiver of irregularities.*—Where the record of a judgment was irregular and imperfect, there being numerous irregularities in the service and return of the process, but all the defendants appeared, pleaded and went to trial before a jury without notice of such irregularities, *held*, that they were waived, and, if not, that they could only be inquired into by appeal or writ or error to set the judgment aside, and not in any collateral way. *Kerrison v. Stewart*, 1 Hughes, 67.

§ 280. — *fraud.*—In a collateral proceeding, it is not enough to show that the court erred, to impeach a decree. If a court had jurisdiction its decree cannot be attacked in a collateral way unless for fraud. *Jones v. Brittan*, 1 Woods, 667.

§ 281. Where fraud is alleged for the purpose of impeaching a decree, it must be affirmatively shown. In such cases fraud is never presumed. *Ibid.*

§ 282. — *decree against administrator.*—A surety upon an administrator's bond cannot attack collaterally a decree made against the administrator. *Stovall v. Banks*,\* 10 Wall., 583.

§ 283. — *bankruptcy.*—In bankruptcy the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts, and may show by any appropriate evidence that the judgment is void or voidable for fraud or irregularity. The creditors having no right to have it reviewed directly may avoid it collaterally, but if the court had jurisdiction, and there has been no fraud or preference, it cannot be shown that the judgment has been rendered for too great an amount. *In re Fowler*, 1 Low., 163.

§ 284. — *decisions of probate court.*—The probate court of a county having decided, upon proper allegations of facts, that the deceased was an inhabitant of that county at the time of his death, this decision is conclusive upon the question, and cannot be inquired into collaterally or in any other manner, except upon appeal; and a subsequent decree by the probate court of another county, granting letters of administration upon the same estate to another administrator, while the first decree is in full force and effect, is void. *Holmes v. Oregon, etc., R'y Co.*, 6 Saw., 262; *Holmes v. Oregon, etc., R. R. Co.*, 7 Saw., 390.

§ 285. *Conclusiveness.*—A judgment of a court of competent jurisdiction, while unreversed, concludes the parties as to subject-matter. *United States v. Nourse*, 9 Pet., 8.

§ 286. A judgment or decree of a court of competent jurisdiction is conclusive upon the same parties in any subsequent controversy touching the same matter. *Hopkins v. Lee*, 6 Wheat., 109.

§ 287. The rule, however, does not apply to points that come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree. *Ibid.*

§ 288. Personal judgments bind only parties and their privies. *Railroad Co. v. National Bank*, 12 Otto, 14.

§ 289. A judgment is conclusive in respect to the parties to it and cannot be questioned upon a creditor's bill. *Mattingly v. Nye*, 8 Wall., 370.

§ 290. The judgment of a court of last resort in regard to the validity of a title to land will not be disturbed. *Minnesota Company v. National Co.*, 8 Wall., 332.

§ 291. The record of a court of competent jurisdiction is conclusive as to all facts which appear to have been passed upon in a case between the same parties involving the same property, and when the second suit is brought for the same object or purpose as the first. *United States v. One Distillery*, 2 Bond, 399.

§ 292. A judgment rendered by a court having jurisdiction of the parties and of the subject-matter, however erroneous it may be, is, until reversed, as efficacious for all purposes as though affirmed by the highest tribunal in the land. Even if appealed from, if proceedings are not stayed, a sale under it conveys a perfect title, and this protection extends to parties and privies, when purchasers under such a sale, as well as to strangers. *South Fork Canal Co. v. Gordon*, 2 Abb., 479.

§ 293. If a court has jurisdiction it may rightfully decide all questions which occur in the case. Errors and irregularities, if any exist, are to be corrected by some direct proceedings before the same court to set them aside, or in any appellate court. Until reversed by a competent tribunal the decision is binding. *Howe's Case*,\* 6 Op. Att'y Gen'l, 506.

§ 294. A., in a former action, recovered for the first instalment of money due upon a contract of purchase of certain timber lands, the payment of which had been guarantied by B. In that action B. set up in defense certain fraudulent representations as to the amount of merchantable timber on the land, made by A. In the present action for the second instalment, he set up the same defense, and also that such false representations amounted to a warranty, upon breach of which he was entitled to recoup for the damages sustained. *Held*, that the second defense was concluded by the former adjudication as well as the first; the finding of the referee, upon which the prior judgment was rendered, showing that no representations as to the quantity of the timber on the land were made. *Lumber Co. v. Buchtel*,\* 11 Otto, 638.

§ 295. The judgment of a court having jurisdiction of the case before it is final between the litigant parties, and this is true whether the parties have used the proper vigilance or not to bring the entire equity before the court and jury. No defect of either party in this respect can avail him under a plea in bar. If it be the same subject-matter of controversy,—if it was fully brought before the court and jury, or might have been so brought before them,—the judgment is final. Negligence or want of knowledge in the management of the case by the counsel or party will constitute no excuse. *York Bank v. Asbury*, 1 Biss., 230.

§ 296. The purchaser of property *pendente lite* is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. *Tilton v. Coffield*, 3 Otto, 163.

§ 297. Under the law of Texas making a judgment in an action of trespass to try title conclusive after a year, such a judgment is not conclusive against unsuccessful plaintiffs or their privies, where, within the year, the successful parties have commenced another action relating to the same land, and the plaintiffs in the first action have set up their title in the second as a defense. *City of Brownsville v. Cavazos*, 2 Woods, 298.

§ 298. A judgment at law in the United States circuit court of Kentucky is not conclusive on the United States circuit court of another state, sitting in equity, as the same would not be conclusive on the circuit court of Kentucky; as the principles and rules of a court of equity differ from those which prevail in a court of law. *Bryant v. Hunters*, 3 Wash., 48.

§ 299. The act of the proper judge in accepting a *cessio bonorum* under the laws of Louisiana, and inhibiting judicial proceedings by creditors, is binding until reversed or set aside, and no rights were lost by creditors in consequence of their observance of the prohibition. *Holdane v. Sumner*, 15 Wall., 600.

§ 300. The assignee of a bond and mortgage, who held the same as collateral security, brought suit thereon in New York without joining the assignor as a party. The obligor of the bond set up a partial failure of consideration, and judgment was rendered for a sum less than the face of the bond. *Held*, that the bond was extinguished by the judgment, and that the judgment was conclusive upon the assignor and those claiming under him. *Chew v. Brumagen*, 18 Wall., 497.

§ 301. A plaintiff who, by giving a sheriff a bond of indemnity, becomes liable as a trespasser, and defends an action brought against the sheriff for such trespass, is concluded by the

amount of the judgment, when an action is brought against him for the same trespass. *Lovejoy v. Murray*, 8 Wall., 1.

§ 302. The defeated party in an action at law in which the judgment has been affirmed on appeal cannot bring the relative merits of the titles involved therein to a court of chancery for adjudication. *Ballance v. Forsyth*, 24 How., 183.

§ 303. A judgment rendered upon demurrer to the declaration or to a material pleading setting forth the facts is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in both cases by matter of record, and can never thereafter be contested by the parties or their privies. *Gould v. Evansville, etc., R. Co.*, 1 Otto, 526.

§ 304. A judgment in trespass against a sheriff for attaching the goods of the plaintiff in an action against another party, where such attachment is ratified by the attaching creditors and the action of trespass is defended by them, is conclusive on them. *Murray v. Lovejoy*, 2 Cliff., 191.

§ 305. A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final is conclusive on all the world. It puts an end to inquiry concerning the fact by deciding it. *Ex parte Watkins*, 3 Pet., 193.

§ 306. The judgment of a federal circuit court is entitled to the same binding effect as a judgment rendered in a state court in the same state. *Dupasseur v. Rochereau*, 21 Wall., 130.

§ 307. In Massachusetts a former verdict and judgment in an action on the case for a nuisance is not conclusive evidence of the plaintiff's right to recover in a subsequent action for the continuance of the same nuisance. *Richardson v. City of Boston*, 19 How., 263.

§ 308. The decision upon the law and facts, by the secretary of the treasury, against a claimant, under article 9 of the treaty with Spain of 1819, is a decision of a competent tribunal of exclusive jurisdiction, and puts an end to the demand, both as to principal and interest. *Humphrey v. United States*,\* Dev., 32.

§ 309. In an action by the United States against an alleged debtor, judgment was rendered against the United States for a large sum. *Held*, that the United States was bound by the judgment the same as a private individual would have been, the only difference being that the judgment could not be enforced by execution against the United States. *Reeside v. United States*,\* Dev., 97, 216.

§ 310. A decree confirming a California land title, where it has become final by stipulation with the United States, is conclusive as to boundaries as well as to title. *United States v. Halleck*, 1 Wall., 439.

§ 311. It seems that money paid under a judgment of a court cannot be recovered in an action for money had and received until such judgment is reversed. *Montford v. Hunt*,\* 3 Wash., 23.

§ 312. Final decrees in California land cases, if regularly made and duly entered in the record, are conclusive between the United States and the claimants unless an appeal is seasonably taken according to law. *Higneras v. United States*, 5 Wall., 827.

§ 313. A judgment in a state court having jurisdiction in a suit to set aside a sale as in fraud of creditors, in which the assignee in bankruptcy was joined, is conclusive as to the creditors, and is also conclusive and binding in the bankrupt court till reversed. *In re Husman*,\* 2 N. B. R., 140.

§ 314. The existence of a Mexican pueblo at the site of the present city of San Francisco upon the acquisition of the country by the United States, and that it possessed an interest in land to the extent of four square leagues, and that the city succeeded to such interest, *held* conclusively established by judicial decisions. *Held*, also, that the final decree establishing that right took effect by relation from the time of the filing of the petition in 1852. *United States v. Hare*, 4 Saw., 638.

§ 315. A decree confirming and quieting the title created by a tax deed in proceedings instituted for that purpose under the laws of Arkansas, where the statutory requirements have been complied with, is conclusive on all parties until reversed. *Thomas v. Lawson*, 21 How., 331.

§ 316. A., with several others, was a party defendant in a proceeding in equity to recover certain bonds. A., in his answer, accounted specifically for fifty-one of the bonds. It was decreed that complainant was entitled to recover possession of the bonds which, at the several times of service of the process in the suit, were possessed or controlled by the defendants respectively. No decree, however, was ever entered against A. for either bonds or proceeds. Subsequently, on motion for a rule on A. to show cause why he should not deliver to the clerk certain of the bonds alleged to be in his possession and unaccounted for, it was held that, as the evidence in support of the motion was identical with that in the former proceeding, and as no decree had been entered on the strength of it, there was no ground for charging A. personally in respect to either bonds or proceeds. *Texas v. Chiles*,\* 10 Wall., 127.

§ 817. In a suit upon an administration bond, brought for the use of persons claiming to be distributees of the estate, against the principal and sureties thereon, the plaintiff offered in evidence the record of a chancery suit in which the persons for whose use the first mentioned suit was brought were complainants, and the administrator, with others, who also claimed to be heirs and distributees of the estate of the decedent, were defendants. This record, after having determined the sum due each of the complainants, directed its payment and awarded executions, went on to direct that the administrator be allowed, as payment to the respective parties, to be deducted from the amounts therein adjudged to them, the principal and interest of any note held by him against any of them. It also directed that the several shares of the parties to whom the estate was awarded should be subjected to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator. It was objected to this decree that it was not final, and therefore not evidence for any purpose, and if admissible was only *prima facie* evidence against the sureties in the bond. It was decided that the decree was final, was admissible in evidence, conclusively established a breach of the administration bond, and was conclusive as to the shares of the plaintiffs in the estate of the deceased. *Stovall v. Banks*,\* 10 Wall., 588.

§ 818. — **Judgments of court of claims.**—The provisions of the act of congress of March 8, 1863, constituting the court of claims, and relating to the conclusiveness of its judgments, was intended to attach to such judgments only the conclusiveness which the common law ascribes to the final judgments of all courts of competent jurisdiction. *Spicer v. United States*,\* 5 Ct. Cl., 34.

§ 819. — **decision of commissioners — Claims against Spain.**—The final decision of the commissioners for adjudicating claims against Spain, under the treaty of 1819, must be presumed to be right, and a decision adverse to a claim presented is a bar to a recovery against the United States thereon. *Thomas v. United States*,\* Dev., 29, 97.

§ 820. — **probate court.**—A non-resident who has appeared in proceedings in a probate court is concluded by the determination of that court and cannot claim the aid of the federal courts in relation to matters there decided. *Amory v. Amory*,\* 12 Am. L. Reg. (N. S.), 88.

§ 821. Under the laws of Maryland the finding of a jury on an issue directed by a probate court, that a person applying for administration on the estate of a person alleged to be his uncle is illegitimate, and an order made thereon granting administration to one who contested the alleged nephew's right to administration is conclusive on the parties in an action of ejectment. *Blackburn v. Crawfords*, 8 Wall., 175.

§ 822. An adjudication in the surrogate's court, on a contest as to who was entitled to administration of the estate of an intestate by reason of nearness of kin to him, is not conclusive in a suit for distribution brought by the plaintiffs, who were one of the contesting parties, against the administrator, who was another, and others. *Caujolle v. Ferrié*, 5 Blatch., 225.

§ 823. Proceedings in, and decrees of courts relating to the settlement and distribution of, the estate of a testator, are not binding upon legatees who have not been parties thereto. *Mathews v. Springer*, 2 Abb., 283.

§ 824. In making an order for the sale of the real estate of a decedent for the payment of his debts, the probate court, having jurisdiction, is presumed to have adjudged every question necessary to justify such order, and such adjudication is binding until reversed. *Florentine v. Burton*, 2 Wall., 210.

§ 825. A judgment in a court of probate of a state is not conclusive where it is obtained by fraud. *Pratt v. Northam*, 5 Mason, 95.

§ 826. The laws of the state of New York requiring that the surrogate should issue letters testamentary to the person entitled to the property by descent, it was held that the determination of the surrogate in a contest for administration in which the question of legitimacy was passed upon is conclusive of that question. *Caujolle v. Ferrié*, 13 Wall., 465.

§ 827. — **confirmation of sheriff's sale.**—Under the laws of Louisiana the decree of confirmation in proceedings to homologate a sheriff's sale is simply conclusive that there have been no fatal informalities or irregularities or defects, but is not conclusive of the question of fraud in the proceedings, nor of the question whether the purchasers have obtained their title by fraud, or whether they are trustees *mala fide* for others. *Jackson v. Ludeling*, 21 Wall., 616.

§ 828. — **Judgment against administrator — Heir.**—Under the laws of the District of Columbia a judgment against an administrator who is without funds is not conclusive against the heir, in a proceeding to charge the realty with the debts of the deceased. *Ingle v. Jones*, 9 Wall., 486.

§ 829. — **forcible entry and detainer.**—Judgment of acquittal in a prosecution for forcible entry and detainer concluded nothing but the facts necessary to sustain the prosecution, and which could be legally at issue. *Peyton v. Stith*, 5 Pet., 485.

§ 830. — **ejectment — New action — Former decision.**—The plaintiff had brought an ejectment which was before the United States supreme court on a writ of error, prior to the pres-

ent action, and the judgment in favor of the defendant was affirmed. He afterward brought the present action of ejectment for the same land. *Per curiam*: Had this case been identical with the former as to the merits, we should have followed the deliberate opinion therein delivered; but as one judgment in ejectment is not conclusive on the right of either possession or property in the premises in controversy, the plaintiff has a right to bring a new suit, and the court must consider the case even if it is in all respects identical with the former, though they may hold it to be decided by the opinion therein given. When the second case presents a plaintiff's or defendant's right on matters of law or fact, material to its decision, not before appearing in the record, it then becomes the duty of the court to decide all pertinent questions arising on the record in the same manner as if the case came before them for the first time, save such as arise on evidence identical as to the merits. *Strother v. Lucas*, 12 Pet., 410.

§ 331. — *persons and parties*.—A decree in a suit by a wife against her husband confirming a deed by him to her is not conclusive in a suit by the assignee in bankruptcy of the husband to set aside the conveyance for fraud. *Humes v. Scruggs*, 4 Otto, 22.

§ 332. Persons who purchase land before the institution of a suit relating thereto, to which their grantors are parties, but to which they are not, are not concluded by the decree rendered therein. *Kanawha Coal Co. v. Kanawha & Ohio Coal Co.*, 7 Blatch., 391.

§ 333. A proceeding under the laws of Louisiana to sell land in satisfaction of a special mortgage lien is not a proceeding *in rem*, and is not conclusive on a person claiming a prior lien on the same premises who was not made a party. *Dupasseur v. Rochereau*, 21 Wall., 180.

§ 334. Persons not parties or privies to a judgment are not bound by it. *Lennox v. Notrebe, Hemp.*, 251.

§ 335. Where there was a decree of a court of chancery for the partition of real estate, an agreement to divide which had been previously made, but one of the parties to the agreement had conveyed all his interest in the estate to one of the complainants, and died before deeds of partition were executed, and the bill was filed against his heirs simply for partition, the decree of the court and deeds executed under it only operated upon the parties jointly interested in the property. *McCall v. Carpenter*, 18 How., 297.

§ 336. Flanders, a treasury agent, under color of the act of congress of March 12, 1863, directed the seizure of certain cotton in the possession of Harrison. In obedience to the instructions of Flanders, one Seelye received the cotton and paid the charges which were against it under the aforesaid act. Afterwards Seelye was ordered by the treasury agent to deliver the cotton to Harrison and retain the charges which he had paid. He did so, Harrison paying the charges under protest. Subsequently, Harrison recovered the amount of these charges from Seelye by suit at law. Seelye having afterwards sued Flanders to recover the same of him, it was held that the judgment against Seelye could not be used in aiding to establish the claim against Flanders, the latter having no notice of the suit against Seelye or opportunity to defend it. *Flanders v. Seelye*,\* 15 Otto, 718.

§ 337. A verdict and judgment in a personal action against the owners of a vessel to charge them with the penalties incurred under section 4465 of the Revised Statutes, for carrying a greater number of passengers than was stated in the certificate of inspection, is not conclusive against subsequent purchasers of the vessel, as to the number of passengers, in a suit *in rem* against the vessel to enforce the lien created by section 4469 of the Revised Statutes, which makes said penalties a lien upon the vessel. *The Boston*,\* 8 Fed. R., 628.

§ 338. The decree of the United States supreme court in the case of *Patterson v. Gaines*, 6 How., 550, cannot affect other persons who were not parties to it, and because that case was not a controversy carried on in earnest. *Gaines v. Relf*, 12 How., 472.

§ 339. — *service of process*.—In an action on municipal bonds brought in a court of general jurisdiction, if the summons is served according to the laws of the state the court has jurisdiction of the parties and of the subject-matter, and the judgment is conclusive until reversed by direct proceedings. *City of Sacramento v. Fowle*, 21 Wall., 119.

§ 340. A decree in a patent suit taken *pro confesso* is not conclusive where the record does not show that the subpoena was served in the district in which the decree was rendered. *Blunt v. Allen*,\* 8 N. Y. Leg. Obs., 105.

§ 341. — *appearance*.—A judgment in an action in a federal court in which the defendants appeared without objection to jurisdiction and participated in the trial must be held conclusive, notwithstanding irregularity in the process. *Kerrison v. Stewart*, 1 Hughes, 67.

§ 342. — *foreign attachment*.—An action of ejectment commenced in 1831, for a tract of land which had been sold under the foreign attachment laws of Ohio, the defendants in the ejectment being in possession under the defendant in the attachment. The judgment in the common pleas of Hamilton county, Ohio, in the attachment suit, was entered in 1808. The writ of attachment was returnable to April, 1807, and it recited that it had been sufficiently testified to the court that the defendant, not residing in the state, was indebted to the plaintiff. The tract of land was attached, and returned with an inventory and appraisement. The

defendant having made default, auditors were appointed, and they made a report, finding due the plaintiff \$267. The court ordered the property sold, which the auditors did for \$170. The court, on inspection, confirmed the sale. The auditors afterwards conveyed by deed to A. and B., who, on the same day, conveyed the property to C., under whom the plaintiffs in ejectment derived title. The proceedings under the attachment were in conformity with the Ohio attachment laws in all but a few particulars. *Held*, that this was the judgment of a court of competent jurisdiction and remained in force until reversed by an appellate power. *Voorhees v. Bank of the United States*, 10 Pet., 449.

§ 343. — notice.— In the distribution of a common fund amongst several parties interested, an absent party, who had no notice of the proceedings, and who was not guilty of wilful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *Williams v. Gibbs*, 17 How., 239.

§ 344. A decree in a suit to have coupons declared invalid and to have them delivered up and canceled does not affect a *bona fide* holder for value without notice, but if he has notice of the pendency of the suit he is bound. *Durant v. Iowa County*, 1 Woolw., 69.

§ 345. An order of a bankruptcy court, in proceedings on the bankruptcy of a mutual insurance company, making an assessment on the premium notes of the members, is not conclusive on the makers of such notes, they not having been mentioned by name or notified of the application. *Lamb v. Lamb*,\* 13 N. B. R., 17.

§ 346. One who has warranted land in Louisiana is not bound by an action of ejectment in which he was cited to appear, where he had no notice, though a curator, appointed by the court to represent him, appeared and answered. *Flowers v. Foreman*, 23 How., 132.

§ 347. — jurisdiction — Record.— Every presumption is in favor of the judgment of a court of general jurisdiction. The record is *prima facie* evidence of it, and will be held conclusive until disproved. *Pennington v. Gibson*, 16 How., 65; §§ 1283-85).

§ 348. For any fraud in obtaining jurisdiction either by an unauthorized appearance of defendant by an attorney, or by confession of judgment by an attorney without authority, or by a false return of the original process, or by any fraud on the party, relief can only be obtained in the court possessed of the original record. If upon inspection of the record the court had jurisdiction, the judgment is conclusive in every other court of co-ordinate jurisdiction. *Ibid*.

§ 347. — review by federal court.— Where a court having complete jurisdiction of the parties and the subject-matter has by decree settled the rights of the parties, a federal court will not review the proceedings and disturb the decree at the suit of one of the parties, though a fraudulent agreement between them is charged in the bill. *Randall v. Howard*, 2 Black, 585.

§ 350. — admissible in evidence.— In general, judgments and decrees are evidence only in suits between parties and privies; but the doctrine is wholly inapplicable where the decree in equity was not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate. *Barr v. Gratz*, 4 Wheat., 218.

§ 351. In a case of warranty and indemnity a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible evidence against him on his contract of indemnity. *Clark v. Carrington*, 7 Cr., 308.

§ 352. Although it was not decided that a decree of a local court thirty years old dismissing a bill in chancery was a bar to a subsequent suit for the cause of action, yet as the decree was rendered shortly after the transactions complained of, and in the county of their occurrence, it was considered as evidence. *Hume v. Beale*, 17 Wall., 336.

§ 353. A former verdict and judgment in an action for maintaining a nuisance is admissible in evidence, but it should have little or no weight if it was founded on erroneous instructions. *Richardson v. City of Boston*, 24 How., 188.

§ 354. The exceptions to the general rule that judgments should be admitted in evidence only between parties to the suit and privies generally relate to some question of custom, right of common, right of way, right of election, or some like question. In such cases the judgment is admissible in an action between other parties; but it is not in such a case conclusive. But a decree in a suit in chancery for an accounting determining the amount due the complainant is not within any of these exceptions. *Baring v. Fanning*,\* 1 Paine, 549.

§ 355. The rule as to the admissibility in evidence of judgments or decrees *in rem* or of courts of exclusive jurisdiction is not applicable to a decree in a suit in chancery for an accounting determining the amount due the complainant. *Ibid*.

§ 356. A record of a recovery of freedom by the female ancestor of the petitioner, on the ground of her having been born free, may be given in evidence to support the petitioner's title, although the present defendant was not a party to the record; and the depositions of deceased



witnesses, contained in that record, may be read, as hearsay, to prove pedigree. *Davis v. Forrest*, 2 Cr. C. C., 23.

§ 357. A recovery in ejectment is conclusive evidence in an action for mesne profits against the tenant in possession, but not in relation to third persons. But where the action is brought against the landlord in fact, the record in the ejectment suit is admissible to show the possession of the plaintiff connected with his title, although it is not conclusive upon the defendant in the same manner as if he had been a party on the record. *Chirac v. Reinicker*, 11 Wheat., 280.

§ 358. Judgment against the administrator of the indorser, and a return of *nulla bona* to an execution, was evidence against the surety of the administrator and fraudulent grantee of intestate debtor. *McLaughlin v. Bank of Potomac*, 7 How., 220.

§ 359. A judgment in an ordinary action at law for the debt secured by a mechanic's lien is not admissible evidence against a surety on an undertaking to discharge that lien. *Phillips v. Coburn*, \* 2 MacArth., 409.

§ 360. The confirmation by the district court of California of a confirmation of a Mexican grant by the commissioners appointed under the act of congress of May 8, 1851, is not conclusive or admissible evidence of title in the confirmee, in ejectment by the holder of a patent who was not a party to the first decree. *Mezes v. Geer*, McAl., 401.

§ 361. A decree in a suit in chancery for an accounting, by a consignor against a consignee, determining that a certain sum is due from the consignee, is not admissible in evidence in a suit by the consignor and persons to whom he had assigned the cargo and its proceeds against the same defendant to enforce the same right, such assignees not having been parties to the former suit. *Baring v. Fanning*, \* 1 Paine, 549.

§ 362. Presumptions.—Where a court has jurisdiction, and has entered judgment, it will be presumed that it did everything that was necessary to warrant the entry of the judgment. The contrary may be shown in a court of error, but the burden of proof is on him who alleges error. *Miller v. United States*, 11 Wall., 268.

§ 363. The presumption is that the judgment of a United States circuit court is proper, and it lies on the plaintiff in error to show the contrary. *Bagnell v. Broderick*, 13 Pet., 436.

§ 364. There is no presumption in favor of the judgments of superior courts except where they have jurisdiction over persons within their territorial limits and the proceedings had are according to the course of the common law. Whenever it appears that the defendants were beyond the jurisdiction of the court at the time service upon them is alleged to have been had, the party seeking to benefit by the judgment must establish the jurisdiction. Neither is there any presumption in their favor when the proceedings are not according to the course of the common law. *Gray v. Larrimore*, 4 Saw., 638.

§ 365. A superior court of general jurisdiction, proceeding within the scope of its powers, is presumed to act rightly, and is presumed to have jurisdiction to give the judgments it renders until the contrary appears. This presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The rule is different with respect to courts of special and limited jurisdiction. There is no presumption of jurisdiction in favor of their judgments. If not affirmatively shown, their judgments are void on their face. *Galpin v. Page*, 18 Wall., 350.

§ 366. The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Such presumptions are also limited to jurisdiction over persons within their territorial limits, and who can be reached by their process, and also over proceedings which are in accordance with the common law. Where special powers are conferred to be exercised in a special manner, not according to the course of the common law, no presumption of jurisdiction will be indulged to support the judgment, but the jurisdictional facts must affirmatively appear on the record. *Ibid*.

§ 367. The rule of common law in regard to presumptions in favor of the regularity of proceedings in courts of general jurisdiction does not apply in cases where there is no appearance, or actual service of the summons except by publication, and the defendant is a non-resident of the state, the reason for the presumption not applying in such a case, as at common law no judgment could be given against a defendant unless he was not only personally summoned, but was arrested or appeared in the action. *Neff v. Pennoyer*, 3 Saw., 274.

§ 368. The general presumption in favor of the judgments and decrees of courts of general jurisdiction is limited to the jurisdiction over persons within reach of their process, and to proceedings in accordance with the course of the common law. Whenever it appears, either from inspection of the record or by extrinsic evidence, that a defendant was, at the time of an alleged service upon him, beyond the reach of the process of the court, the presumption ceases, and the burden of establishing jurisdiction over him is thrown upon the party who invokes the benefit or protection of the judgment. So, where the proceedings are not according to the common law, courts of general jurisdiction exercise only a limited and special jurisdiction. An order

of publication to bring non-resident defendants into court must be shown to strictly follow the statute authorizing it, or, in the absence of an appearance, the judgment or decree rendered thereon is invalid as to such non-resident. *Gray v. Larrimore*, 2 Abb., 542.

§ 369. When the judgment of a court of general jurisdiction is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained. But where the proceeding is special and outside of that general scope, or the judgment is against a party without the territorial limits of the court, and who was not served within those limits and did not appear, there is no such presumption of jurisdiction. *Galpin v. Page*, 8 Saw., 93.

§ 370. A decree of divorce which provided that it might be modified on the application of either party upon sufficient cause shown is not a temporary decree, but is absolute till changed. The presumption is that it remains unchanged, and that presumption can only be overcome by record evidence to the contrary. *Bennett v. Bennett*, Deady, 299.

§ 371. Where it is provided in a decree of divorce that it may be modified on the application of either party, upon sufficient cause shown, such decree is not merely temporary; the presumption is that it remains unchanged, and such presumption can only be overcome by record evidence. So, also, where a decree may be appealed from within a year, it is deemed final until an appeal is taken. *Ibid.*

§ 372. Where, from an official certificate from the clerk of the court, it was doubtful whether a certain decree was rendered in a suit, which was a nullity for want of a plaintiff, or in another which was not, *held*, that as there is a presumption in favor of the regularity of the proceedings of a court of general jurisdiction, this presumption was sufficient to warrant the conclusion that the decree was rendered in the latter suit, and not in the one which was a nullity. *Alexander v. Knox*, 6 Saw., 54.

§ 373. The finding of a court of the necessary facts to confer jurisdiction in cases of service by publication is entitled to the same presumption as to correctness as in cases of personal service. *Galpin v. Page*, 1 Saw., 309.

§ 374. The presumption in favor of the validity of judgments of superior courts in cases where there is a mode provided by law for acquiring jurisdiction for the purposes of the action are not made to rest on the fact that the parties to the proceeding reside within the territorial jurisdiction of the court, but upon the character of the courts themselves, and the great principles of public policy which require that some confidence should be reposed in the proceedings of the higher judicial tribunals of the land. *Ibid.*

§ 375. Jurisdiction.—The rule of jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears to be so. *Ibid.*

§ 376. Under the California statute authorizing constructive service by publication of summons upon non-resident and absent parties, in certain cases full proof of the jurisdictional facts must be insisted in the judgment roll, and the judgment record must disclose the order of the court for such substituted service. *Galpin v. Page*, 8 Saw., 93.

§ 377. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. *Pollock v. Lawrence County*,\* 2 Pittsb. R., 187.

§ 378. Want of jurisdiction will always invalidate the judgment of a court. *Gray v. Larrimore*, 4 Saw., 638.

§ 379. A want of jurisdiction in a court renders its judgment or decree unavailable for any purpose. *Gray v. Larrimore*, 2 Abb., 542.

§ 380. Where a decree is void for want of jurisdiction in the court which rendered it, all proceedings based thereon partake of the same infirmity. *Galpin v. Page*, 8 Saw., 93.

§ 381. —service of process—Appearance.—By the general law of the land, no court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process to appear and defend. *Hollingsworth v. Barbour*, 4 Pet., 466.

§ 382. The court will acquire jurisdiction of the person of the defendant in a suit commenced by attachment, if he voluntarily appears, and by pleading, demurring, going to trial, and moving for a new trial, submits himself to the jurisdiction of the court. *Maxwell v. Stewart*,\* 22 Wall., 77.

§ 383. A defendant who, after pleading to the merits, obtains leave to and does withdraw his plea, is still liable to have a valid personal judgment rendered against him, though he was not personally served with process. *Eldred v. Bank*, 17 Wall., 545.

§ 384. When the defendant against whom the judgment was entered had no notice, and that appears from the proceedings, the judgment is a nullity. But where there was due notice, or an appearance of the defendant, no other error in the proceedings can make the judgment a nullity. *Farmers' Loan and Trust Co. v. McKinney*, 6 McL., 1.

§ 385. — **order of publication.**— Whenever a statute authorizes constructive service by publication, its provisions must be strictly complied with, or the judgment cannot be sustained, unless the party voluntarily appears. *Gray v. Larrimore*, 4 Saw., 688.

§ 386. A state may properly give its citizens a remedy against non-residents to the extent of their property situated within the state, and may provide that an actual seizure of the property need not be made till after the rendition of the judgment; and a judgment rendered under such laws is conclusive as to the property affected, if the state statutes have been followed, but not otherwise. And an affidavit for an order for publication which contains no evidence that the plaintiff has a cause of action against a defendant, or fails to show the diligence used to ascertain the defendant's postoffice address, gives the court no jurisdiction, and a judgment rendered thereon is void. *Neff v. Pennoyer*, 3 Saw., 274.

§ 387. — **void judgments.**— The judgment of a court that has not jurisdiction to render it is void, not voidable. *Fisher v. Harnden*, 1 Paine, 55.

§ 388. A judgment of a state court in a case where jurisdiction was acquired, not by the common law, but by a statute of the state, which before the rendition of the judgment had been virtually repealed by the adoption of a treaty, was held not voidable, but void. *Ibid.*

§ 389. An order, decree or judgment of a court which has no jurisdiction is a nullity, and it makes no difference where the judgment or decree is set up. *Lincoln v. Tower*,\* 2 McL., 473.

§ 390. A domestic judgment may be shown to be void upon its face, if the court rendering it had no jurisdiction of the defendant's person. But except for errors affecting the jurisdiction of the court its validity cannot be questioned. *Owens v. Gotzian*,\* 4 Dill., 436.

§ 391. When a court of competent jurisdiction has determined a controversy or question, the parties thereto, their privies in blood, law and estate, are bound by the judgment; but if neither of the parties to the suit has any interest in the subject-matter of the suit, the judgment is void, the court never having obtained jurisdiction. *Lownsdale v. The City of Portland*, Deady, 1.

§ 392. If the jurisdiction of a federal circuit court be not shown in the proceedings in the case, its judgment is liable to be reversed, but it is not an absolute nullity. *Kennedy v. Georgia State Bank*, 8 How., 586.

§ 393. Judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are binding on all the world; and this failure to state jurisdictional facts can avail only on writ of error. *Ex parte Watkins*, 3 Pet., 193.

§ 394. — **no service of process.**— In an action in a federal court to enforce the personal liability of stockholders of a bankrupt corporation, a judgment rendered against persons who were not served with process, and did not appear, was void. *Godfrey v. Terry*, 7 Otto, 171.

§ 395. A personal judgment is invalid if it is rendered by a state court on a money demand without service of process or appearance of the defendant. *Mickey v. Stratton*, 5 Saw., 475.

§ 396. A personal judgment, not used as a means of reaching property at the time within the state, or affecting some interest therein, or determining the *status* of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits, and not appearing to the action, is void and of no effect. *Galpin v. Page*, 3 Saw., 93.

§ 397. When the record of a judgment is offered in evidence, if a want of jurisdiction is shown or appears upon the face of the proceeding, it must be held as wholly void. If the proceeding has been by attachment and no personal notice has been given, and the defendant does not appear, it does not bind the defendant. *Lincoln v. Tower*,\* 2 McL., 473.

§ 398. In a suit brought to settle an alleged partnership between the plaintiff and a deceased person, a decree for the sale of land belonging to the estate of the deceased, rendered in favor of the plaintiff without any service upon a non-resident infant heir of the deceased who is made a defendant, except service by publication, and rendered by the consent of a guardian *ad litem* appointed for the infant, is void, and the purchaser takes no title. *Galpin v. Page*, 3 Saw., 93.

§ 399. The rule in regard to presumptions in favor of proceedings in courts of general jurisdiction does not apply in cases where there is no appearance or actual service of summons, and the defendant is a non-resident; and in such a case the burden of showing jurisdiction is on the person claiming under the decree. *Neff v. Pennoyer*, 3 Saw., 274.

§ 400. No judgment can be rendered by a United States circuit court against any defendant who has not been served with process issued against his person in the manner pointed out by section 11 of the judiciary act of 1789, unless the defendant waives the necessity of such process, by entering his appearance to the suit. *Levy v. Fitzpatrick*, 15 Pet., 167.

§ 401. **Judgment validated.**— A state legislature may validate the judgments of a *de facto* court, though in giving the judgments the court may have transcended its jurisdiction. *Mechanics' & Traders' Bank v. Union Bank* 22 Wall., 276.

§ 402. *Docketing.*—A docket entry of a judgment is sufficient if from the whole of it the amount and date of the judgment, the parties to it, and the court in which it was rendered, can be ascertained. *In re Boyd*,\* 16 N. B. R., 204.

§ 403. If a statute making the docket of a judgment a lien requires the amount of the judgment to be stated, the use of mere numerals, without anything to indicate that they represent dollars or other denomination of money, is not sufficient. *In re Boyd*,\* 4 Saw., 262.

§ 404. A docket entry of a judgment in which the number of dollars for which the judgment is rendered is indicated by numerals, without the word "dollars" or a sign therefor, is invalid if it does not otherwise appear from such entry what the actual amount of the judgment is. *In re Boyd*,\* 16 N. B. R., 137. But if it appears from the entry that the numerals indicate dollars, the docket entry is valid and constitutes a lien. S. C., id., 204.

§ 405. The docket of a judgment is not a part of the judgment or action in which it was rendered. If not complete in itself it is of no validity, and defects and ambiguities in it cannot be cured by a reference to the judgment. It is an independent record of particular facts authorized for the special purpose of creating and fastening a lien upon the real property of the judgment debtor against all parties subsequent in interest, and therefore it must be complete in itself or it is without effect. The record may, however, be examined to test the validity of the docket entry. *Ibid.*

§ 406. A verdict was rendered in 1860 in Georgia, but no judgment was rendered thereon, owing to the intervention of the civil war. The record was lost and the defendant had died, when, in 1867, the plaintiff filed a transcript and asked to have the judgment docketed. *Held*, that it could not be done *nunc pro tunc*, but the personal representatives being non-residents, they must be made parties by *scire facias*. *Baldwin v. Lamar*, Chase's Dec., 432.

§ 407. The lien of a judgment, as provided in sections 226-8 of the Oregon Civil Code, arises not from the judgment but the docket thereof. Without the entry in the docket there is no lien. Nor is this lien contingent upon the issuing of an execution and a levy. Being a creature of the statute, its existence and validity depend upon a docket entry in conformity to the statute. The docket is no part of the judgment or the action in which it was rendered; and the entry must be complete in itself: if defective, ambiguous or insufficient, it cannot be aided by a reference to the judgment or other proceeding in the action. It must itself impart all the information which the statute contemplates. But the whole entry of the docket is to be looked to, and not merely a single item of it. *In re Boyd*,\* 4 Saw., 262.

§ 408. The circuit courts of the United States, under the power given them by the seventeenth section of the judiciary act of 1789, and the seventh section of the act of 1792, have power to make rules regulating the signing, filing and docketing of judgments. *Koning v. Bayard*, 2 Paine, 251 (§§ 915-22).

§ 409. Where a regular docket of judgments has been kept by the clerk of a circuit court of the United States, from the year 1795, in the manner required by the state laws, this is sufficient to warrant the conclusion that it was adopted by order of the court. *Ibid.*

§ 410. *Miscellaneous.*—The opinion of the judge on collateral matters not involved in the record is not to be incorporated in the judgment of the court. *The Steamboat Pacific and the Brig Fashion*, Newb., 41; *Brig Fashion v. Ward*, 6 McL., 195.

§ 411. The judgment of a court of general jurisdiction need not state the facts on which it is founded. *Gager v. Henry*, 5 Saw., 237.

§ 412. A double judgment cannot be rendered for a single debt. *Ashley v. Maddox*, Hemp., 217.

§ 413. A judgment in an action on a note that the defendant go without day contains sufficient to show that the judgment was against the plaintiff. *Burnham v. Webster*, 1 Woodb. & M., 172 (§§ 1237-40).

§ 414. A transcript of a judgment and proceedings of a justice of the peace in Pennsylvania, entered of record in a county court, is not a judgment of that court. *Allen v. Arguelles*, 4 Cr. C. C., 170.

§ 415. A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits. *Wilson v. Speed*, 3 Cr., 233.

§ 416. A disallowance, by commissioners, of a claim, on the ground that a fact material to the establishment of the claim is not proved, is a disallowance on the merits. *Roberts v. United States*,\* Dev., 32; *Roberts v. United States*, id., 33, 97.

§ 417. The act of March 3, 1797, which provides that judgment shall be given at the return term against debtors of the United States, on motion, is limited to cases in which the principal debtor is a party to the action. *United States v. Lyon*, 2 McL., 249.

§ 418. The rule that chancery will not decree where a doubt exists refers to the intention of the parties from the face of the contract, and not where some doubt may exist as to a certain fact in the cause, however important it may be. *Walton v. Payne*, 1 McL., 120.

§ 419. Under the statutes of Wisconsin the holder of a certificate of a sale on execution cannot maintain a bill to restrain waste by the judgment debtor before the time for redemption has expired. *Law v. Wilgees*, 5 Biss., 13.

§ 420. A decree of condemnation is not to be avoided by the fact that a good defense existed to the proceedings which was not pleaded. *Griswold v. Connolly*, 1 Woods, 193.

## II. AMENDING, OPENING AND VACATING JUDGMENTS.

**SUMMARY**—During the term at which the judgment was rendered, § 421.—After lapse of term, §§ 421, 424, 426, 431-433; exceptions, § 422.—Rules of state courts not applicable in federal courts, §§ 423, 424.—After lapse of seventeen years, § 425.—Judgment kept open for further relief, § 426.—No answer filed, §§ 426, 427.—Failure to present defense, § 428.—After lapse of eight years, § 429.—Default in admiralty, § 430.—Decrees in equity; lapse of term, § 431.—Decrees in equity and in admiralty; fraud; lapse of term, § 432.—Mistake in name of a party, §§ 433, 434.

§ 421. All judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are entered of record, and they may be then set aside, vacated, modified or annulled by that court. But after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if error exists, they can only be corrected by writ of error or appeal in a court having power to review them. *Bronson v. Schulten*, §§ 435-37.

§ 422. The exception to the rule that a judgment cannot be modified, corrected or set aside by the court which renders it, after the term at which it is rendered, allowing a writ of error *coram vobis* to bring before the court in which the error has been committed, some matter of fact which has escaped the attention of the court and which was material in the proceeding, is generally limited to the facts that one of the parties to the judgment died before it was rendered, or was an infant and no guardian appeared or was appointed, or was a *feme covert*, and the like, or that there has been error in the process through default of the clerk. It does not reach the facts submitted to a jury, or found by a referee, or by the court sitting to try the issues. *Ibid.*

§ 423. The tendency of courts of the states to apply to their control over their own judgments some of the principles of courts of equity, going further in administering summary relief than the old fashioned writ of error *coram vobis* did, whether founded upon statutes or the inherent power of the court, does not obtain in the courts of the United States or affect them in any manner. *Ibid.*

§ 424. The authority of the court to set aside, vacate or modify its final judgments after the term at which they are rendered can neither be conferred upon or withheld from the courts of the United States by the statutes of a state or the practice of its courts. *Ibid.*

§ 425. Plaintiff sued a collector of customs to recover back excessive charges paid on seventy-four entries of goods at the custom-house specifically set out in his bill of particulars. A verdict was rendered in his favor fixing the precise error under which the excessive duty had been exacted, and leaving to a referee to ascertain the amount due on each of the entries. The referee made a report, omitting nearly one-half of the entries. A judgment was rendered in conformity to this report, and the money paid and accepted. Seventeen years afterward the judgment was sought to be opened to correct the report as to the omitted entries. It was held by the supreme court that the lower court erred in opening the judgment. The court said that if there was no question of lapse of time, or of the power of the court over its own judgments after the term, and if the suit were a bill in chancery to set aside the judgment on the ground of mistake, no relief could be granted because of the negligence, carelessness and inattention and laches of the plaintiff or his counsel. *Ibid.*

§ 426. After the term at which a final judgment or decree is entered, the courts of the United States have no power to open the judgment or decree and grant a rehearing, or let a defendant in to answer, unless at the time at which the judgment or decree is entered some order is made which keeps the judgment open for further relief or proceedings. It was so held where the defendants, being served with process, appeared in the suit but put in no answer, their attorney being under the misapprehension that no substantial relief was sought against them, and where they had the same ground of defense as other defendants who had been held not liable. *Linder v. Lewis*, §§ 440-41.

§ 427. The equity rules require that if no answer or plea is put in, the bill shall be taken *pro confesso*, and it is the ordinary practice to enter such a formal order, but the omission to do so does not affect the regularity of the final decree. The entry of the final decree upon

notice is equivalent to such an order. The want of such an order is one of those defects of form or such a want of form as is referred to in Revised Statutes, section 954. *Ibid.*

§ 428. No one can be relieved from a judgment upon the ground that he has a defense to it, which, through his own fault, he failed to present at the trial. It will not avail him to say that he was ignorant of it when the case was tried. Thus, where a judgment was recovered upon a postmaster's bond at the suit of the United States against the surety thereon, it was held that the latter could not move the court to stay execution on the judgment and declare it satisfied, because he had a claim against the government under the abandoned or captured property act, and failed to set up the claim at the trial because he did not know at the time that the money arising thereon had been paid into the treasury. A writ of *audita querela* will not lie in such a case. *Avery v. United States*, §§ 442-43.

§ 429. A judgment was rendered on a verdict taken upon failure of the defendant to appear in an action against the defendant as surety upon a distillery bond, the action being founded upon an assessment of a deficiency tax to make up the amount of spirits required as eighty per centum of the producing capacity of the distillery, as fixed by survey, the survey being made under section 10 and the assessment under section 20 of the act of July 20, 1868. Eight years after the rendition of this judgment the defendant sought to open it upon affidavits seeking to show that, in making the survey of the distillery, the assessor took no part, and the person designated to aid the assessor under the above section was arbitrarily required by the commissioner of internal revenue to fix the producing capacity of the distillery at what was stated in the report of survey made, which was larger than such person's own judgment as to such capacity. It was held that the judgment could not be opened for this cause, there being no question of illegality in making the survey. *United States v. Millinger*, § 444.

§ 430. By rule governing the admiralty court, ten days are given a defendant in which to move for a rescission of a decree by default and a rehearing. So where the counsel of a claimant in a libel for collision, being unexpectedly absent, permitted a default to be taken and final decree was thereupon entered, his motion to open the decree and for leave to answer, filed nearly a year afterward, was denied. *The Illinois*, §§ 445-46.

§ 431. Doubted, whether a court of equity ought to open a final decree after the expiration of the term at which it was entered, on the ground of oversight, mistake or forgetfulness of defendant or his counsel. (Authorities cited.) *Ibid.*

§ 432. While decrees in chancery *pro confesso* obtained by fraud may be set aside at a subsequent term on a regular bill filed for that purpose, and on which evidence may be taken in the regular way to establish the fraud, yet a decree in admiralty cannot be set aside on motion at a subsequent term. *The Oriental*, § 447.

§ 433. Neither by the common law, nor under section 82 of chapter 20 of the judiciary act of 1789, can a judgment be amended, after the term at which it is entered, by changing the Christian name of the plaintiff from that appearing in the record as his name. *Albers v. Whitney*, §§ 448-51.

§ 434. A judgment is conclusive, as against the defendant against whom it is rendered, that the plaintiff's Christian name is as stated in the record, notwithstanding the record may be erroneous in this respect. *Ibid.*

[NOTES.—See §§ 452-544.]

#### BRONSON v. SCHULTEN.

(14 Otto, 410-418. 1881.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—On the 26th day of January, 1877, the following order was made of record in the court below:

"*J. W. Schulten et al. v. Greene C. Bronson, and twenty-two other causes.*

"A motion having come on to be heard before this court in the above-entitled causes to open the judgments therein:

"Now, on reading and filing notice of motion dated December 27, 1876, and affidavits annexed of Almon W. Griswold and A. Heydenreich, on the part of the plaintiffs, and Almon W. Griswold having been heard for the motion on the part of the plaintiffs, and George Bliss, Esq., United States district attorney, in opposition thereto, and due deliberation had, it is ordered that the

judgments entered in the above-entitled causes upon the verdicts therein be vacated, and that the assessment of the plaintiffs' damages under the verdicts in said causes be referred to John I. Davenport, Esq., as sole referee.

"And it is further ordered that the referee proceed to adjust *de novo* the plaintiffs' damages under said verdicts in accordance therewith, and from the amounts found due, if any, he deduct the sums paid upon the judgment heretofore entered in each of said cases, respectively, and that he report the balance, if any, found due the plaintiffs in each of said cases.

"The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, and either party may, on the hearing, raise objections, and said referee shall decide thereon, and either party may file exceptions to such decision of the referee within two days after the filing of the referee's report, and bring them to a hearing before the court upon four days' notice.

"Dated January 26, 1877."

March 8, 1877, another order was made that the action be continued in the name of Lucretia Bronson, executrix of the will of Greene C. Bronson, who had died in 1863. March 10 the referee's report was filed, in which it was found that there was due plaintiffs, in addition to what had been paid under the judgment set aside, the sum of \$1,205.90, and on this sum interest was allowed to the amount of \$2,017.21. For these sums, with added costs, a judgment was rendered in their favor. To reverse this judgment the present writ of error is brought.

Enough of the record of the original suit, the judgment in which is thus set aside, is produced before us to show that the action was against Bronson, as collector of customs for the port of New York, and the claim was for duties in excess of what was authorized by law on a large number of separate importations; that a verdict was given on the trial for plaintiffs for "the amount, with interest, of the difference between duties levied and paid under protest, on commissions at two and one-half per cent., and such duties if levied on commissions at two per cent.," on the class of importations in question. The commissions alluded to were those paid by the importers before shipment to this country. As the amount to be recovered under this verdict was matter of computation and inspection of the custom-house papers, it was referred to Samuel Ogden to make report.

Neither the judgment of the court which was set aside, nor the report of Ogden, on which that judgment must have been entered, nor the plaintiffs' bill of particulars, on which the action was based, is found in the transcript of the record on which we are to consider this case. Nor is there any bill of exceptions, as there should have been, embodying the evidence on which the court acted in setting aside the former judgment. Nor is the date of that judgment to be ascertained from anything in this record, unless we can look at certain affidavits found in the transcript; for neither the notice of the motion to set it aside nor the order granting that motion mention the date of that judgment. It would seem that a party seeking to open or set aside a judgment seventeen years after it had been entered and the amount of it paid, in order that another judgment for a larger amount might be rendered in the same suit, was not very anxious to call attention to dates.

This imperfect state of the record has made us hesitate to enter upon a review of the case, but as the order setting aside the original judgment refers to the notice of motion and the annexed affidavits as the foundation of that

order, and identifies those papers as they are found in the transcript, we are of opinion that they may be considered as part of the record, so far as the question of the authority of the court to make that order is involved.

Looking to these affidavits, in connection with what is more strictly a part of the record, it appears that the original suit was commenced in one of the state courts, September 2, 1858, and afterwards removed into the circuit court of the United States, where plaintiffs filed a declaration containing the common counts. It appears that they also served a bill of particulars, setting out seventy-four entries of goods at the custom-house, on which they had been charged excessive duties by the defendant Bronson, which they had paid under protest. The affidavit of Murray, a refund clerk in the custom-house, states that in thirty-four of these entries the sums which should have been allowed plaintiffs were omitted in the adjustment. It was on this statement that the judgment rendered on the report of the first referee, Ogden, without objection or exception on either side, on the 5th day of August, 1860, was set aside, and a new reference made. This judgment, it appears, was also paid and accepted by plaintiffs in a few days, we may suppose, after it was rendered. The affidavit of plaintiffs' attorney, who attended to the original action, and on whose motion the original judgment was set aside, states that the adjustments were made by Ogden, who was an auditor at the custom-house, and by the collector of customs, and by the clerk of the court; that in 1864 he discovered that certain errors had been committed in fourteen other cases of a similar character, in which other persons were plaintiffs, to their prejudice, for which new actions were commenced, and held barred by the statute of limitations; that as to other cases, including the one now before us, he did not discover that items embraced in the bill of particulars had been omitted, until an investigation of certain recent cases of like character against Collector Redfield; that in the readjustment of these latter cases his attention was turned to the source of the errors in the one now in question. The affidavits of Heinrich and Murray tend to show that all was not included in the adjustment under the verdict that ought to have been.

We have thus a case in which plaintiffs sue for excessive charges on account of these commissions paid on seventy-four entries of goods, specifically set out in their bill of particulars. A verdict is rendered in their favor fixing the precise error under which the excessive duty had been exacted, and leaving to a referee to ascertain the amount due on each of these entries. The referee reports as to all but thirty-four, nearly half, of these entries, and as to them makes no report. A judgment is rendered in conformity to the report, the money paid and accepted, and seventeen years afterwards the judgment is opened to correct the omission of these thirty-four entries.

We are of opinion that, if there was any mistake in the report of the referee and in the judgment rendered thereon, it was so clearly due to the negligence and inattention of plaintiffs or their attorney, that no case is made for relief in any of the modes known to the law, of correcting an erroneous judgment after the term at which it was rendered.

Stress is laid upon the fact in argument that the referee was one of the clerks in the custom-house, who had access to all the books and papers of the office. It is probable he was selected by both parties because of his familiarity with those accounts, but he is not mentioned in the order of reference as such clerk or officer. Any other person so appointed would have been permitted to examine the necessary books and papers, and in this matter he must



be held to be, as no doubt he was, an impartial referee, representing neither the collector nor the government which was to pay the sum found due.

The plaintiffs had the same right to appear before him, examine his report and the evidence on which it was founded, to take and urge to the court exceptions to it, as in case of any other reference. Nothing of the kind was done, and though it is here said that no report at all was made as to thirty-four out of seventy-four entries set out in plaintiffs' bill of particulars, no exception was made to the report on that ground, nor any inquiry made as to the reason for such omission. It is obvious that if this had been done, the error which is now complained of would have been corrected before the report of the referee was confirmed and judgment rendered on it. If, then, there was no question of lapse of time, or of the power of the court over its own judgments after the term at which they are rendered, and if this were a bill in chancery to set aside this judgment on the ground of mistake, it is clear that no relief could be granted, because of the negligence, carelessness, and inattention and laches of the plaintiffs, or of their attorney, in the matter. Does the power of the court over its own judgment, exercised in a summary manner on motion, after the term at which it was rendered, extend beyond this?

§ 435. *During the term at which it was rendered a judgment is under the control of the court.*

In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court.

§ 436. *After the expiration of the term, errors in a final judgment can only be corrected by an appellate court.*

But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks v. Railroad Co.*, 102 U. S., 107 (APPEALS, § 2476); *Public Schools v. Walker*, 9 Wall., 603; *Brown v. Aspden*, 14 How., 25 (APPEALS, §§ 2473-75); *Cameron v. McRoberts*, 3 Wheat., 591; *Sibbald v. United States*, 12 Pet., 488 (APPEALS, § 2600); *United States v. The Brig Glamorgan*, 3 Curt., 236 (APPEALS, §§ 1331-33); *Bradford v. Patterson*, 1 A. K. Marsh. (Ky.), 464; *Ballard v. Davis*, J. J. Marsh. (Ky.), 656.

§ 437. — *what is a writ of error coram vobis, and what class of errors can be corrected thereby.*

But to this general rule an exception has crept into practice in a large num-

ber of the state courts in a class of cases not well defined, and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram vobis*, a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert*, and the like, or error in the process through default of the clerk. See Archbold's Practice.

In Rolle's Abridgment, p. 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same, but in another and superior court. In *Pickett v. Legerwood*, 7 Pet., 144 (APPEALS, §§ 161-63), this court said that the same end sought by that writ is now in practice generally attained by motion, sustained, if the court require it, by affidavits; and it was added, this latter mode had so far superseded the former in British practice, that Blackstone did not even notice the writ as a remedy.

It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis*, found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case. There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old fashioned writ of error *coram vobis* did. This practice has been founded in the courts of many of the states on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the states where a system has been adopted which amalgamates the equitable and common law jurisdiction in one form of action, as most of the rules of procedure do.

§ 488. — *source of the power of the federal courts.*

It is a profitless task to follow the research of counsel for the defendants in error through the numerous decisions of the state courts cited by them on this point in support of the action of the circuit court. The cases from the New York courts, which go farthest in that direction, are largely founded on the statute of that state, and we are of opinion that on this point neither the statute of that state nor the decisions of its courts are binding on the courts of the United States held there. The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts.

We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power

supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could not, according to its established principles, have granted the relief which was given in this case.

§ 439. *Delay in moving to correct a judgment.*

It is also one of the principles of equity most frequently relied upon, that the party seeking relief in a case like this must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief. As we have already seen, nothing hindered the plaintiffs from discovering the mistake of which they complain for seventeen years, but the most careless inattention to the proceeding in which they had claimed these rights and had them adjudicated.

There was here an acquiescence for that length of time in the correctness of a judgment which had been paid to them, when the error, if any existed, only needed a comparison of their own bill of particulars with the report of the referee, to be seen, or at least to be suggested. Having been negligent originally, and having slept on their rights for many years, they show no right, under any sound practice of the control of courts over their own judgments, to have that in this case set aside. It follows that the judgment of the circuit court must be reversed, with directions that the order vacating the former judgment be set aside, and the motion of plaintiffs in that matter be overruled.

LINDER v. LEWIS.

(District Court for New York: 1 Federal Reporter, 378-382. 1880.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a motion to open a final decree entered at the September term, 1879, whereby the defendants Wettstein, Meyer and Ochninger were decreed to pay to the complainant, as assignee in bankruptcy of Wallach & Co., the sum of \$3,109.24. These defendants were judgment creditors of Wallach & Co., before their bankruptcy, and after the execution of a general assignment for the benefit of creditors by the bankrupts, and before the filing of the original petition in bankruptcy, these defendants and several other judgment creditors took out their executions and placed them in the hands of the sheriff, who levied on goods covered by the general assignment.

Afterwards, the sheriff requiring indemnity before he would sell the goods, the several judgment creditors, defendants, indemnified him, but some of the judgment creditors withdrew their bonds and took action, which has been held in this suit to exempt them from liability to account to the complainant for the proceeds of the goods sold by the sheriff. The suit was brought against the general assignee, the sheriff and the judgment creditors to set aside the voluntary assignment, and to compel the sheriff and the judgment creditors to account for and pay over the value of the goods sold. The final decree was for the complainant, setting aside the assignment and charging the sheriff and the judgment creditors, who did not withdraw their authority to the sheriff, with the proceeds of the goods.

These moving defendants were duly served with process and appeared in the suit, but put in no answer. Their time to answer was twice extended by stipulation. It appears now, by the moving papers, that through some misapprehension on the part of their attorney, he was led to believe that no substantial relief was sought against them in the suit. They were, however, regularly served with notice of all the proceedings in the cause, had notice of

the applications for the interlocutory and for the final decree, which was entered, as above stated, at the last September term. They now claim that they have the same precise defense which has been sustained as to other defendants; that is, that before the sale they withdrew the sheriff's authority to sell on their account, and that they have lost the opportunity to make this defense solely through this mistake of their attorney. Meanwhile, the others, defendants, who were charged by the decree, have appealed to the circuit court, and the marshal has taken proceedings to enforce the entire decree against these defendants.

§ 440. *A judgment cannot be opened after the close of the term at which it was rendered.*

The case is clearly one in which the court would gladly give these parties relief if it had the power. They are apparently in the position of being called on to pay what other defendants, upon the same state of facts, have been held not liable to pay, and if the appeal of the defendants who have been charged should be sustained, they are also charged with what will, in that case, be held to have been a claim not well founded against any of the defendants. But it is clear that, after the term at which a final judgment or decree is entered, the courts of the United States have no power to open the judgment or decree and grant a rehearing, or let a defendant in to answer, unless at the time at which the judgment or decree is entered some order is made virtually keeping the judgment open for further relief or proceedings. Supr. Ct. Rules in Eq., 18 and 19; *Mueller v. Ehlers*, 1 Otto, 249 (APPEALS, §§ 1957-58); *Scott v. Blaine*, 1 Bald., 287; *Herbert v. Butler*, 14 Blatch., 357 (APPEALS, § 1968).

The rule is based on the theory that public and private interests require that there should be an end of litigation after a party has had his day in court, and ample opportunity to present and assert his rights by way of prosecution or defense. And in the courts of the United States this limit of litigation, subject to the right of appeal or review, is fixed at the end of the term of the court at which the final judgment is entered. In this case these defendants had ample opportunity to present their defense, and it must be accounted their own negligence and laches that they did not do so. At any rate, the court is without power to relieve them on motion.

§ 441. *An irregularity that is immaterial.*

The only suggestion of irregularity in the proceedings in the cause is, that no formal order appears to have been entered that the bill be taken *pro confesso* against these defendants. It is the ordinary practice to enter such an order, but I cannot say that the omission to do so affects the regularity of the final decree or makes it any less absolute.

The rules require that, if no answer or plea is put in, the bill shall be taken *pro confesso*, and the entry of the interlocutory decree upon notice, and of the final decree, also upon notice, must, I think, be held to be in effect equivalent to such an order. I do not perceive that the failure to enter the order, these defendants having full notice of all the proceedings, and being, of course, chargeable with notice that they had not answered, can possibly have prejudiced them, and the want of such an order is one of those defects of form or such a want of form as is referred to in Revised Statutes, section 954, which the court is required to disregard. See *Bank v. White*, 8 Pet., 262.

It is further suggested that as the complainant is an assignee in bankruptcy he is, more than plaintiffs ordinarily, under the control of the court, and that he should, therefore, be restrained in the exercise of the powers of the court in

bankruptcy from taking an unconscionable advantage of these defendants for the benefit of the creditors of the bankrupts.

Whether this court, sitting in bankruptcy, could relieve these judgment debtors against the collection of this judgment on the ground that it could, as a court of bankruptcy, take notice of their alleged claims for equitable relief, and if so, whether it could be done against the objection of any creditor of the bankrupts; in other words, whether it would be within the powers of the court in bankruptcy to relieve them from that absolute estoppel by record to deny the obligation to pay this judgment which the judgment itself creates, is a question which cannot be raised here, because this application is not made to the court sitting in bankruptcy, but to the court exercising its jurisdiction in equity and bound by the rules established for such a court, and it is a motion in this very cause in which the decree must be held to import absolute verity. And in this court, sitting in this cause in equity, the complainant certainly has all the rights of other suitors. Motion denied.

#### AVERY v. UNITED STATES.

(12 Wallace, 804-807. 1870.)

ERROR to U. S. Circuit Court, District of West Tennessee.

**STATEMENT OF FACTS.**—Avery owned a warehouse in Memphis, Tenn., and the United States took possession of it, and under the captured and abandoned property act leased it, and collected the rents to the amount of \$7,000, which was paid into the government treasury. Avery having at the close of the war returned to Memphis, the United States sued him as surety on the bond of the postmaster of Memphis appointed before the war, and obtained judgment against him for \$5,023. In May, 1869, Avery filed a petition in the same court in which said judgment was rendered, setting forth these facts, and praying the court to stay the execution and declare the judgment satisfied. He also alleged in his petition that he did not present his claim as a set-off in the cause, because he did not then know that the money was in the United States treasury, and that he did not know it until shortly before filing his petition. Upon filing said petition he also moved for a writ of *audita querela*. The court below denied both the prayer of the petition and the writ, and the case is brought up by writ of error.

Opinion by MR. JUSTICE DAVIS.

Conceding, for the purposes of this suit, that the order of the circuit court in the premises is a final judgment, within the meaning of the twenty-second section of the judiciary act, to review which a writ of error will lie, did the court err in the disposition it made of the case?

The lease of the house was authorized, if the owner of the property was voluntarily absent from it and engaged in the rebellion, and, as the federal military forces during the term of the lease occupied Memphis, it is fairly to be inferred that Avery had abandoned his house under circumstances which warranted the officers of the government in taking possession of it; and the presumption is, in the absence of an averment in the petition to the contrary, that these officers discharged their duty, and paid into the treasury the money received by them for the rent of this property long before the suit against Avery was tried in the circuit court. If so, and the United States, on this account, were indebted to Avery (a point on which we express no opinion), it was the duty of

Avery, to plead this indebtedness by way of set-off, to the action brought against him.

§ 442. *No relief against a judgment where a party fails to present his defense.*

It is a familiar principle that no one can be relieved against a judgment, however unjust he may consider it, if he had a defense, and, through his own fault, failed to present it. Avery is in this predicament. It will not avail him to say that he did not know, when the suit was tried, that the money was in the treasury, for it was his business to have informed himself on the subject. This he could easily have done by communicating with the bureau of the treasury department, where the accounts of the leases and sales of abandoned property were kept, and this inquiry would have resulted in obtaining evidence equally available for his purpose as that which accompanies his petition. It would lead to endless embarrassments in the administration of justice, if a party were permitted to reopen a judgment on the ground that he had a defense which he did not present because ignorant of it, but which the court can see he could have known if he had used reasonable diligence to ascertain it. It is impossible to suppose that Avery, on his return to Memphis after the war, was not informed of the state of things concerning the occupation of his house during his absence, and yet he institutes no inquiry on the subject, and, when subsequently sued by the United States for a large demand, allows it to pass into a judgment without the assertion of any claim for the use of his property. Under these circumstances he cannot be permitted to do, two years after the rendition of the judgment, what he should have done on the trial of the cause.

It follows, as the result of these views, that the circuit court did not err in overruling the motion to recall the execution and satisfy the judgment.

§ 443. *When audita querela lies.*

Nor did it err in refusing the writ of *audita querela*, because this writ does not lie where the party complaining has had a legal opportunity of defense, and has neglected it. *Lovejoy v. Webber*, 10 Mass, 104; *Thatcher v. Gammon*, 12 id., 270; *Bacon's Abr.*, title *Audita Querela*; *Wharton's Law Lexicon*, same title.

Besides, *audita querela* is a regular suit in which the parties may plead and take issue on the merits (*Brooks v. Hunt*, 17 Johns., 484), and cannot, therefore, be sued against the United States, as in England it could not against the crown.

*Judgment affirmed.*

#### UNITED STATES v. MILLINGER.

(Circuit Court for New York: 19 Blatchford, 202-205. 1881.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—In this case a judgment was entered in this court on the 12th of October, 1872, against the defendants, for \$8,288.62. The judgment was on a verdict of a jury, taken on a failure of the defendant to appear at the trial. The action was on a distillery bond, on which the defendant Boyd was surety, and was founded on an assessment of a deficiency tax to make up the amount of spirits required as eighty *per cent.* of the producing capacity of the distillery as fixed by the survey, the survey being made under section 10, and the assessment under section 20, of the act of July 20,

1868 (15 U. S. Stat. at Large, 129, 133). In February, 1880, the defendant Boyd presented to this court affidavits seeking to show that the extent of the actual capacity of the distillery, with the materials and implements used, did not exceed the quantity of spirits returned as produced; and that, after the assessment for deficiency was made, and before this suit was brought, moneys were collected under a distraint made under the assessment, which were not credited in entering the judgment.

§ 444. *A circuit court has no power to vacate a judgment on the score of mistake after the lapse of years.*

On these affidavits a motion was made to open the judgment and for another trial by a jury. The court, Shipman, J. (17 Blatch., 451), (a) said, that "the only tenable reason for opening the judgment" was the omission of the credits; that the court had power to correct such a mistake, on the authority of *Crookes v. Maxwell*, 6 Blatch., 468, and that the judgment ought to be opened only for the purpose of allowing evidence to be given of payments made by the defendant Millinger, or out of his property, which ought to have been allowed and deducted from the face of the assessment of damages, before entering the judgment, but not for the purpose of giving evidence of other defenses to the claim of the plaintiffs. It was urged to the court, that, under the ruling of the supreme court, in *Clinkenbeard v. United States*, 21 Wall., 65, decided at the October term, 1874, the evidence as to the actual capacity of the distillery would have been competent if it had been offered at the trial of this suit, and that it was not offered because a course of decisions based on the views stated in *United States v. Hodson*, 14 Int. Rev. Rec., 100, and in other cases, had held that the assessment of the deficiency tax could not be questioned in a suit on the bond. But Judge Shipman's view was, evidently, that the court had no power to open the judgment for the cause stated, for the purpose of permitting the defense in question to be made. At the same time that the motion in this case was made before him, a motion was also made before him in *United States v. Teven*, in this court, to open a judgment which had been rendered in 1873 and had been paid. The motion was based on alleged error in the exclusion of testimony offered at the trial by the defendant, such testimony constituting his defense. The testimony was excluded on a construction of the statute supposed to be correct. The supreme court had afterwards held, in another case, that such construction was erroneous. In denying the motion, February 2, 1880, Judge Shipman said: "The question in regard to vacating the judgment is neither one of practice, nor of procedure, nor of discretion, nor of the power of the state courts in similar circumstances, but of the power of the federal courts. I am of opinion that this court has no power, on a summary motion, to vacate a judgment rendered at a previous term upon the grounds set up in the motion papers. *Bank of the United States v. Moss*, 6 How., 31 (COURTS, §§ 53-59); *McMicken v. Perin*, 18 How., 507 (CONTRACTS, §§ 578-80); *Wood v. Luse*, 4 McLean, 254."

The defendant Boyd now presents affidavits in this case seeking to show that, in making the survey of the distillery, under section 10 of the act of

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(a) The court has power after the term to open a judgment rendered by default, for the purpose of correcting errors of fact in the amount of the judgment arising from the inadvertent omission of the plaintiff to give credits and allow payments made by the defendant, or out of his property, upon the claim of the plaintiff, which should have been deducted at the time of the assessment of damages. In this case the judgment was opened after eight years. *United States v. Millinger*,\* 17 Blatch., 451.

1868, the assessor took no part, and the person designated to aid the assessor under that section was arbitrarily required by the commissioner of internal revenue to fix the producing capacity of the distillery at what was stated in the report of survey made, which was larger than such person's own judgment as to such capacity. On this a motion is made to open the judgment and for a new trial by a jury.

I think the court has no power to grant this motion. In addition to the cases cited in *United States v. Teven*, those of *Medford v. Dorsey*, 2 Wash., 433; *Cameron v. McRoberts*, 3 Wheat., 591; *Brush v. Robbins*, 3 McLean, 486, and *The Bank v. Labitut*, 1 Woods, 11, may be referred to. It is held in some other courts that the power exists, but in the federal courts it does not.

A distinction is urged in respect to this case, on the view that the error sought to be corrected was an error of fact, while in *United States v. Teven*, and other cases, it was an error of law, and that in the *Teven* case the judgment was paid, and so the parties were out of court. The evidence referred to and sought to be introduced on the new trial is evidence of facts which existed when the case was tried. The failure to put them in evidence did not constitute error in fact. There was no error in any proceeding of the court. A mistake or illegality in conducting the survey, or the failure of the defendant to offer evidence thereof, was not an error of the court of any kind. The principle of the cases cited applies to and controls the present case, and requires that the motion should be denied. It is not intended to imply that there was any illegality in the mode of making the survey, as that question has not been considered.

#### THE ILLINOIS.

(District Court for Michigan: 1 Brown, 13-82. 1857.)

Opinion by WILKINS, J.

STATEMENT OF FACTS.—Upon the return day of the process in this case, twenty days were taken by claimant to answer. At the expiration of this time, his counsel being engaged in the trial of a cause at Monroe, which had been unexpectedly prolonged, his default was taken and a final decree was entered October 29, 1855, for \$1,926. Claimant's counsel returned from Monroe a few days after the decree was entered, and at once took an appeal to the circuit court. This appeal was, however, dismissed upon the ground that an appeal would not lie upon a decree taken by default. He now moves the court to open the decree, and for leave to answer.

§ 445. *Practice in admiralty; opening default.*

Under General Admiralty Rule 29, the court may, in its discretion, set aside a default, and admit the defendant to answer at any time before final hearing and decree, upon payment of costs. This rule obviously has no application to cases where a final decree has been entered. Under rule 40 the court may in its discretion, upon motion of defendant and payment of costs, rescind a decree by default and grant a rehearing, *at any time within ten days after the decree has been entered*. The material point to be determined in this case is whether the court has power thus to rescind a decree not only after the ten days have expired, but when a whole term has intervened between the rendering of the decree and the making of the motion. Aside from the rule, I have very grave doubt whether a court of admiralty ought to open a final decree, particularly after expiration of the term, upon the ground of oversight, mistake or forgetfulness on the part of defendant or his counsel. The En-



glish authorities are unanimous in holding that a final decree cannot be opened upon this ground.

§ 446. — *authorities reviewed.*

In the case of *The Vrouw Hermina*, 1 Ch. Rob., 163, 168, a decree was rendered January 27, 1799. On the 7th of February the counsel moved to open it, on the ground of a mistake on his part. The court (Sir W. Scott) says, "I will not go so far as to lay it down universally, that it is not in the power of the court to reconsider its decrees on very particular occasions." Speaking of the case then before the court, he says, "as a precedent, it would be a practice highly dangerous, and the liberty of reviewing its decrees, *if it exists, which I do not affirm*, is a liberty which the court would exercise with very great caution; because I foresee that, were applications of this sort to be easily admitted, they would be very frequently made on reasons much less sincere than those which are now offered to the court." "Without discussing the power of reviewing a sentence," he rejects this application.

In the case of *The Elizabeth*, 2 Acton, 57, application was made to rescind a decree condemning the cargo, on the ground that there had been an understanding that upon the production of certain affidavits consent should be given to a rescission of the decree — and these proofs were now produced — and the counsel cited a case to show that the court would rescind its decrees. But the court (Sir John Nicholl) says: "As far as I recollect that case, it rather proved the rule that this court does not rescind its decrees. The motion to rescind was made upon a reference to the registrar and merchants; but was refused, as it was said it was not the practice of this court to rescind its decrees, and open the matter anew, whatever other redress the parties might obtain by an application to the court, should it be proved they were materially aggrieved" — and the application was refused.

The case cited by the counsel above was that of *The Geheimrath*, decided in 1798, in which it was represented to the court that since the decree the proofs upon which the decree had been rendered *had been impeached, and shown to be fraudulent*, and a motion was made to rescind and allow evidence to be given *of that fraud*. "But the court refused, and said, their decree being final, it would be contrary to their practice to rescind it and open the subject anew; nor where even it appeared *a fraud* had been practiced, they could not go out of the order of their practice; the parties, however, might apply to the court in another shape, if they could satisfactorily prove they were aggrieved."

In the case of *The Fortitudo*, 2 Dodson, 58 (June, 1815), the libelants commenced one action on a bottomry bond — then dismissed it, alleging the claim was settled. Shortly after they commenced a new suit on the same bond. The defendants moved to dismiss the latter suit, on that ground, and the court granted the motion, with costs, and demurrage. The court (Sir W. Scott, p. 70), after commenting on the affidavits, says: "They do not, in my apprehension at least, render it necessary that I should inquire how far the permission again to *open a case which has been once closed* comes within the range of that large discretion with which this court is by its commission intrusted. It might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper in some cases to suffer a cause to be reopened. *But it certainly would not do so unless there existed very strong reasons to show the propriety of the measure.* I feel no hesitation in saying that *mere negligence, or oversight, would not be a sufficient ground for such an extraordinary interposition of the authority of the court.*

*A direct case of fraud, or something equivalent to it, must be made out before I can suffer such a step to be taken.*" And then he says, in regard to the affidavits, "Let us see, then, whether there be any such ground in the present case. *There has been no fraudulent concealment or withholding of documents. The master has sworn, and it is not denied, that he produced all the papers and delivered them over to the (libellant, who) must be presumed to have examined and scrutinized them. They cannot now be heard to say that they acted improvidently and without due caution. If they did so in point of fact, they must abide by the consequences of their own negligence.*"

A case relied upon by the defendant's counsel is that of *The Monarch*, 1 W. Rob., 21, decided in 1839. An *interlocutory* decree had been pronounced by Sir John Nicholl, deceased, after a hearing on evidence, it being a case of collision, declaring *both parties in fault*, and referring the cause to the registrar to take accounts, etc. A question of *costs* was afterwards raised and a motion made to alter the decree *in that particular*; and a decision made in the house of lords in 1824 was cited to show that in such a case the costs should have been (as a *matter of law*) decreed differently. Doctor Lushington, who heard the motion, refers to that case, and says that if that case had been brought to the notice of Sir John Nicholl he would unquestionably have varied the decree to conform to it, as regards the costs, *if it had been in his power*. He then goes on to consider whether he would have had the power, according to the practice of the court. He says (p. 26): "If it was a frequent practice to alter the decisions of the court, much evil and inconvenience would doubtless ensue in consequence. At the same time; it is to be observed that great injustice may be occasioned if this court has not such a discretionary power of varying its decrees as is possessed by other courts of this country. The court of chancery, *before enrollment of a decree*, may, and often does, alter, vary and amend it," etc.

This case does not sustain the defendant. In the first place, there had been no *final decree* at all — and the case was still before the court, standing on a mere "interlocutory" decree of reference — and yet the court hesitated much about granting the motion. In the second place, the amendment which was allowed was one *of law* entirely, and not of facts. It was a case of an error of the court, as to the law — an error *apparently of record*. Again, it was an *amendment*, merely, and not a rescission — still less a reopening of the case for new proofs.

Judge Conkling (2 Adm., p. 367), commenting on this case, says: "It seems very clear that the learned judge entertained no notion of any power in the court analogous to that exercised by courts of equity upon a bill of review, or of any power to *grant a rehearing upon questions of fact*." "The error to be corrected in the case before him was *an error of law*," — and he says that this is the only case that contains, so far as he has discovered, an explanation of the views entertained by the high court of admiralty on this point. These cases, extending over a period of sixty years, show that negligence, inadvertence, oversight, mistake of counsel or party, are no grounds for rescinding decrees, on motion, whatever other mode there may be. Fraud, or its equivalent, is the only ground, and in one case even that was held not to be good ground.

The courts of admiralty in this country apparently follow the same practice. In the case of *The Avery*, 2 Gall., 386, a decree had been rendered, condemning as prize a British vessel and cargo; afterwards a claim was presented by certain merchants of Morocco, alleging the property to be theirs and ask-

ing that the decree be rescinded. The court refused. And Judge Story says that in cases of prize a reasonable time is allowed for neutral claimants to interfere, "and if no claim is interposed within that time, condemnation follows of course, *in pœnam contumaciæ*. Nor is this a mere arbitrary regulation. It is to be found in analogous cases in the common law," etc., "at all events, it is a part of the admiralty law which this court is bound to respect, and we are not at liberty, upon any notions of supposed inconvenience, to create a novel regulation. If the present be found unsuitable to our circumstances, as a maritime power, it will be for the legislature to devise a more just and equitable rule. *Stare decisis* is a great maxim in the administration of the law of nations." "This court can have no more jurisdiction to revive or review the cause, or to sustain the present application, than it can have to adjudicate upon any other cause which has been determined within twenty years." "It is utterly incompetent in this court, sitting as such, to grant an appeal in a cause which is no longer within their cognizance."

The case of *The Martha*, 1 Blatch. & How., 151, decided in 1830, is in point, and the court, Judge Betts presiding, lays down the doctrine and its reasons at full length. In this case a decree had been pronounced dismissing the libel, with costs; afterward, and in the following term, a motion was made to vary the decree as to the costs, and the motion was heard and granted. But on another motion being made for a decree against the *sureties* for those costs, the matter again came up, and the court vacated the last order, the judge observing he had supposed, when he made that order, that the case was still open. At page 171 he says: "I should certainly never have allowed the argument in this cause to proceed, unless I had supposed that the whole case was under the control of the court, and that the former decree stood suspended until a decision could be had upon the question of costs." "The proposition now before the court is, whether a court of admiralty, after hearing and definitive decree, can, of its own authority, rehear the cause or nullify the decree at any time subsequent to the term in which it was rendered." "The proceeding in this case had all the effect of a rehearing — *the case had been disposed of*." He alludes to the practice in the English admiralty and ecclesiastical courts and in the French courts. As to the latter he says: "In the French practice, which conforms very closely to the civil, the judgment becomes perfect as soon as it is pronounced, and the judge cannot correct it after the rising of the court, and after the register has entered the judgment upon the minutes as it was given." Cites Pothier on Civil Procedure, ch. 5, art. 2. He says that courts of chancery allow a rehearing upon sufficient reasons, at any time before decree enrolled, "*but this practice has never been introduced into the courts of common law or admiralty.*"

The judge then gives the reasons for this rule, as derived from "the character of the suits usually prosecuted here." "Usually it is of the last importance to suitors here to have an immediate dispatch of their business. Seafaring men are not in circumstances to conduct protracted and reiterated litigations upon their claims, and it is usually better for their interests to have prompt decisions, even though adverse to their demands. Experience, I believe, fully justifies the remark, that, whether in the instance or the prize courts, every delay and appeal is of serious detriment to the mariner's interest. The sum in dispute is usually small and of immediate necessity to the suitor. It is for his interest, therefore, that the most speedy decision possible should be ob-

tained, and that, when it is adverse to him, he should rather go immediately to his employment than linger over the contingencies of a reconsideration of his case. These views have probably led to the exclusion from courts of admiralty of the practice referred to, and I concur in the sentiments of the eminent men sitting in the English admiralty and consistory courts upon this point, that it is a matter of great doubt whether a power of this description should be exercised in this court without the free consent of all parties to be affected by it."

In the case of *The Steamboat New England*, 3 Sumn., 495 (APPEALS, §§ 1319-23), a petition, in the nature of a libel for a rehearing or of a libel of review, had been filed. In deciding whether such a libel was admissible in admiralty practice, the court (Judge Story, p. 502) refers to the case of *The Fortitudo*, above cited, and then says: "But I am not aware that after the decree has been entered or entered on record, and the term has passed, that any court of admiralty, at least in this country, has ever entertained an application for rehearing. In the high court of prize commissioners in England it is said to be the practice never to rescind a decree after it is passed, or to open the subject anew. But at the same time it was, by implication, admitted that another mode of redress might be adopted, meaning, I suppose, that a libel in the nature of a bill of review in equity might be sustained," etc. A libel of review is, of course, very different from a "motion."

These cases in England and America settle this point, it would seem, beyond controversy, that courts of admiralty cannot, *on motion*, rescind a decree. There may be another form of remedy, but what that is we are not here called upon to discuss. Judge Story seems to think a *libel of review* would lie, but the present is a mere motion. In this respect (of not rescinding a decree after the term is passed) other courts follow the same rule.

In *Hudson v. Guestier* a question was decided in the supreme court of the United States, at February term, 1810. 6 Cranch, 281. At February term, 1812, a motion was made that the case be reheard (7 Cranch, 1), but the court say, "that the case could not be reheard after the term in which it had been decided." This case is a leading one. It is cited by Judge Story in *The Avery*, above cited, 1815; by Judge Betts in *The Martha*, 1830.

In *Martin v. Hunter*, 1 Wheat., 355 (APPEALS, §§ 682-729), the court say: "A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties and could not be re-examined."

In *Sibbald v. United States*, 12 Pet., 491 (APPEALS, § 2600), 1838, the court say: "No principle is better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of fact or law after the term at which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake—from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review in equity and writs of error *coram vobis* at law are exceptions which cannot affect the present motion."

In *Wash. Bridge Co. v. Stewart*, 3 How., 425 (APPEALS, § 2715), 1844, the

court say, "The want of power in this court to review its judgments or decrees has been so frequently determined by it that it is not now an open question."

In the circuit court of the United States the same rule prevails at law and in equity. In *Albers v. Whitney*, 1 Story, 310 (§§ 448-51, *infra*), a motion to amend a judgment by inserting "John" instead of "James," which had been inserted in the writ by mistake, was refused. Judge Story alludes to the United States statute of jeofails (Judiciary act of 1789, sec. 32), and says it provides for amendments in form only — that by it "no authority is given to the courts of the United States to make any amendments in judgments, except as to defects and want of form," and this he says is not a matter of form, and there is nothing on the record to amend by. He further says, "It is plain that at common law no judgment was amendable after the term at which it was entered, and amendments could be made in the process, etc., only while the cause stood in paper, and before judgment. The authority to amend them, even in England, in cases of this sort, is dependent upon and limited by statute."

In *Wood v. Luse*, 4 McLean, 254, a motion was made after judgment rendered and the term elapsed, to set aside certain proceedings in the case. The court say, "If the motion was not objectionable on other grounds, it is clear that the proceeding on the original suit, and the notes on which it was founded, could not be revised in this manner." Referring to the New York practice, he says: "But by the common law, the judgment of a previous term cannot be set aside on motion; and this is the doctrine of the supreme court," — "a clerical error in the entry of the judgment will be corrected at any time, but *judgments cannot be set aside on motion, after the term at which they were entered.*"

In *Doggett v. Emerson*, 1 Woodb. & Minot, 1, a motion was made (in equity) to vary a decree pronounced, but not actually entered, at a previous term. The motion was refused, and Judge Woodbury says: "But as an entry is necessary to complete their operation and give them full effect, like an enrollment of a decree, or a signature of it by the chancellor of England, it is in the power of the court to make changes in them *before that is done*, and probably *before the term closes* at which the entry is made." But after it is once pronounced and communicated to the parties, it would be, he says, "altogether destructive of judicial consistency and firmness to do so, unless made upon good and urgent cause, on a full rehearing by both parties." "There must be shown some *obvious mistake* of law or fact, or some new matter since discovered;" and he cites *The Avery* (above cited) as holding that the court will not grant a rehearing after the term has ended.

In *Jackson v. Eldridge*, 1 Wood. & M., 61, the court refused to vary a decree in chancery on petition. The judge says, "a decree is usually considered final after the end of the term at which it was rendered" — but may be before, as it was in this case. After it is final a mere clerical mistake, in figures or form, may be corrected on motion or petition, "*but nothing done which goes to its merits and to the principles or orders themselves that have been made by the court.*" "In states where no statutes exist expressly remedying such cases, it is very questionable whether any power exists at common law to reopen or change, in a material part, any final judgment." He refers to the case of *Cameron v. McRoberts* (above cited), and says that though in that case "some years had elapsed, the principle is the same whether it be days or years, if the

judgment has gone from the waste book and minutes, and been entered up as perfected." And he also refers to a case not reported, *Dixon v. Lewis*, before the supreme court, at January term, 1845, in which the circuit court had *suspended* a final judgment by default, on motion of the defendant, on the ground that he had been prevented from appearing by mistake as to the term of the court. The majority of the supreme court held that the court below *had no power to suspend that judgment* — but the case went off upon another ground. In the state courts the same rule prevails.

In *Miller v. Hemphill*, 4 Eng. (Ark.), 488, in chancery, an order was made, October 10, 1845, dismissing a cause *for want of prosecution*. On the 10th of April, 1846, *on motion* and affidavits, the cause was reinstated. On appeal, it was held that that order "was clearly *coram non judice*, inasmuch as at the term next preceding, the cause had been dismissed for alleged want of prosecution." See, also, *Smith v. Stinnet*, 1 Pike, 501.

In *Hill v. Richards*, 11 S. & M., 194-9, a bill in chancery was dismissed in 1842 on account of the failure of complainant to give security for costs, as required by a previous order. In 1846 a receiver, who had been appointed and had acted in the case before its dismissal, applied by petition to the court for an allowance, which was granted. On appeal the court say, "a petition in many respects very nearly resembles a motion, etc. Either one or the other *is proper only when a case is pending*," or when a court of chancery has jurisdiction on petition by *express statute*. "After the dismissal of the bill in 1842, the original cause was *no longer in court*, the parties were no longer before it, and *its jurisdiction was at an end*." This case was approved and same point decided in *Starke v. Lewis*, 23 Miss. (1 Cush.), 151.

In *Deeds v. Deeds*, 1 Greene (Ia.), 394, a decree was granted in June, 1847, divorcing the parties, and giving the custody of children to the father. Afterwards a petition was presented to set aside the latter provision, and granted. On appeal, held erroneous. The appellate court say that part of the decree "is absolute, and cannot be changed, altered or reversed by any court except an appellate court," or by bill, etc., *impeaching it for fraud*, or matter arising afterward.

In *Burch v. Scott*, 1 Gill & Johns., 393, the court of appeals held that "a decree signed and enrolled could not be reheard on petition," and that it would be considered as enrolled when signed by the chancellor and the term ended. In *Pfeltz v. Pfeltz*, 1 Md. Ch. Dec., 456, that case is cited and approved and the same point decided. The court say, "it is clear that if an application were made by petition to open the enrollment and vacate the decree, it must be refused." The decree in this case was by default or *pro confesso*. In *Thompson v. Ward*, 8 B. Mon., 26, the court say a decree can only be set aside for error or fraud. In the former case only by appeal or writ of error, or by bill of review — in the latter, only by an original bill.

In *The Commonwealth v. Shanks*, 10 B. Mon., 304, the court below, after the end of the term, varied a judgment at law as to the costs. On appeal, held, "the order or judgment made at the November term was a final order — nothing was left open for the future action of the court, and no power was reserved to change or modify the judgment. If an execution had been issued not authorized by the judgment, the court could, at a subsequent term, have quashed it, etc., or quashed the taxation of costs, if improperly made *by the clerk*, but they had no authority to correct their final judgment after the close of the term at which it was made."

In *Ashley v. Glasgow*, 7 Mo., 320, a motion was made to set aside a judgment for costs made at a previous term — refused. On appeal, held, “when the term is past, then the control of the court ceases, and no alteration or amendment can be made but such as is authorized by the statute of jeofails and amendments.” In *Lindell v. Bank of Missouri*, 4 Mo., 228, judgment was rendered, November term, 1825, against the bank. The record stated that the parties “appeared by their attorneys.” In 1833 the bank moved to set aside the judgment on the ground that there had been no notice or lawful process served. Motion granted. On error to the supreme court, the court say: “The only question to be considered is, whether the court could, contrary to the record, receive proof that the parties were not rightfully in court. The record says the bank appeared by attorney. This must stand as true; at all events it cannot be contradicted by affidavit. If this were allowed, *then every judgment rendered in a court of record would at all times be subject to the same proceeding*; no property would be safe, the sanctity of a record would be lost, and with it all security for right. It may be, if the attorney who appeared for the bank did so by mistake, this mistake, if discovered, might be corrected *during the term, but hardly afterwards*.”

In *Lampsett v. Whitney*, 3 Scam., 170, a motion was made at December term, 1841, to rehear a cause decided at December term, 1840 — refused. The court say, “one term has intervened, etc., and it is now too late to make it. The court conceives *it has no power over the case*.” “It is believed that in no instance has the court entertained a petition for a rehearing after the lapse of a term.”

From these cases it appears that it is not in admiralty courts alone that this rule prevails. It may at first view seem harsh, and in some cases it may operate hardly. Yet it is the only safe rule that can be followed. Any other practice would destroy the sanctity and conclusiveness of records, open the door to endless litigation, unsettle rights of property and person, cause delay, expenses and ruin — “*Interest reipublicæ ut sit finis litium*”— it would accumulate and clog the business of the courts, and render it impossible to get through it. As the rule now is, parties understand their rights and duties, and it becomes them to be vigilant and prompt, and not to sleep upon them.

Now what effect does rule 40, of which we have spoken, have? It does alter the general practice so far as to allow a decree by default to be opened on good cause shown after the decree is rendered, and even after the term is ended, in cases where the term ends before the ten days are expired. But the privilege thus given is expressly limited to the ten days specified, and unless applied for within that period, no benefit whatever can be derived *from that rule*. The rule carries with it no power or force *beyond its express terms*.

The court, in making that rule, evidently had in view the general admiralty practice which forbids, as we have shown, any interference with a decree after it is once rendered. In a spirit of liberality, the court saw fit to relax that general rule to a certain extent and no more. The fact that it did so relax it does not authorize this court to relax it still more. The fact that it *fixed the limit* and the boundary is evidence that it intended that the limit *should not be passed*. The rule is to be construed as if it were a *law*, and it has all the force of a statute. This appears from the history of its adoption.

Congress, on the 23d of August, 1842, passed an act (sec. 6, 5 Stat. at Large, p. 516) authorizing the supreme court to adopt rules for the government of the admiralty courts. In pursuance of this act, the supreme court, at January

term, 1845, adopted these rules. The rules so adopted were in effect adopted *by congress itself*, the supreme court being but its agent for that purpose.

In the state courts of Michigan it is held that their rules, adopted in a like manner, have the force of statutes. But whether they are to be considered as a *statute* passed by congress or not, yet they are prescribed *by the supreme court* and are *the law of this court*, which is a subordinate one, and bound to obey the requirements of its superior. So far as this court, then, is concerned, they are, at all events, "*a law*," and to be considered as such. There are many authorities which hold that a rule, even of its own making, *is a law of the court*, and that the court has no discretion to depart from them. Ram on Legal Judgments, 33; Ogden v. Robertson, 3 Green, 124; Rex v. Mann, 2 Strange, 755; Dunbar v. Conway, 11 Gill & Johns., 92; Wall v. Wall, 2 Har. & Gill, 79; Thompson v. Hatch, 3 Pick., 512.

*A fortiori*, this will apply to a rule prescribed by a superior court. A rule may be *extended* on application beforehand, but when once the period prescribed by a rule is passed, *rights have vested* which the court cannot take away. Now, then, construing this rule as a law, what operation is to be given to it? Dwarris on Statutes, 641, says: "It is a maxim generally true, that if an affirmative statute which is introductive of a new law directs a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner." Again, "If a new power be given by an affirmative statute to a certain person by the designation of that one person, although it be an affirmative statute, all other persons are in general excluded from the exercise of the power, since *inclusio unius est exclusio alterius*. Thus, if an action founded on a statute be directed to be brought before the *justice of Glamorgan*, in his sessions, it cannot be brought before any other person, or in any other place."

Again, at page 667, he says: "An act of parliament sometimes directs the manner in which a defendant shall be entitled to take advantage of the enactment, as by pleading the statute in bar; in such cases the party *must pursue the remedy pointed out*, or if he do not avail himself of it *at the proper time, and in the manner and form prescribed*, he cannot take advantage of it afterwards."

In 6 Bacon's Abridg., 383-4, the following rules for the construction of statutes are laid down. He says we must consider the old law, the mischief, the remedy, and the reason of the remedy. He says: "The best construction of a statute is to construe it *as near the rule and reason of the common law as may be*." "When a statute directs a thing to be done generally, and *does not appoint any special manner*, it shall be done according to the course of the common law." "In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be *agreeable to the rules of the common law* in cases of that nature; for statutes *are not presumed to make any alteration* in the common law, *farther or otherwise than the act expressly declares*; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for if the parliament had had that design *they would have expressed it in the act*." Again, "If a new remedy be given by statute in any particular case, this shall not be extended to alter the common law *in any other than that case*." Again, "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter." Again, at page 391, "Every statute ought to be construed for the preventing of delay as much as possible." "If the meaning of a statute is doubtful, the *consequences* are to be considered in the construction;



but where the meaning is plain, no consequences are to be regarded, for this would be assuming a legislative authority." "A statute creating a new jurisdiction ought to be construed strictly."

Let us apply these rules to the present case: This rule 40 gives a *new remedy* — it is an innovation on the common law of admiralty (so to speak) — it gives a *new jurisdiction* to the court. It is, therefore, to be construed strictly — as near the common law rule as possible. It is not to be presumed the rule was intended to alter the common law rule "further or otherwise than it expressly declares." This rule is calculated to cause delay. It must be so construed as to prevent delay "as much as possible." But the important point is that the remedy given is to be sought in a special manner, and at a special time, and it cannot be done in any other manner. The words of Dwaris, at page 667, are expressly applicable.

This principle is a plain one, and is acted upon every day. For instance, the statutes of Michigan authorize the defendant to redeem land sold under execution at any time within twelve months. No one has ever claimed that that statute gave him any privilege beyond its express letter, or that he could redeem an instant beyond the time fixed. Again, it is a principle that applies to contracts and statutes both, that the express enumeration or adoption of certain things is an exclusion of all others.

Judge Leavitt, in the case of *Ward v. Ogdensburg*, 5 McLean, 641, commenting on admiralty rule 15 (which allows, in cases of collision, a suit either against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*), said that inasmuch as this rule expressly enumerated those classes of suits, it was in effect a prohibition of all others; and he held that an action against the *ship and owners* could not be sustained; and he cites several cases to sustain his decision; and his decision on this point was not reversed on appeal, the point being abandoned by counsel.

In *Marbury v. Madison*, 1 Cranch, 174, a question arose as to the extent of the original (contradistinguished from appellate) jurisdiction of the supreme court. The constitution declares that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, etc. In all other cases it shall have appellate jurisdiction." It was insisted that as the clause giving original jurisdiction contained no negative word, the congress could by statute give it in other cases than those enumerated. But the court held otherwise, and said, "affirmative words are often in their operation negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them, or they have no operation at all."

Judge Story (1 Com. on Const., sec. 448) says: "There are certain maxims which have found their way, not only into judicial discussion, but into the business of common life, as founded in common sense and common convenience. Thus it is often said that in an instrument a specification of particulars is an exclusion of generals, or the expression of one thing is the exclusion of another. Lord Bacon's remark, that 'as exception strengthens the force of law in cases not excepted, so enumeration weakens it in cases not enumerated,' has been perpetually referred to as a fine illustration." Again, "there can be no doubt that an affirmative grant of power in many cases will imply an exclusion of all others. As, for instance, the constitution declares that the power of congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legis-

lative authority. Why? Because an affirmative grant of special powers would be absurd as well as useless, if a general authority were intended."

In the present case, to give this court power to open a decree at any time *within ten days*, would be useless, if the supreme court meant or understood that they had the same power *without* the rule, or that they had it after the ten days expired. The affirmative grant, I think, of the ten days' limit is an exclusion and prohibition of all other time.

Again, Judge Story, speaking of the constitutional powers of the government, says (1 Com. Const., sec. 426): "On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the people may remedy it." If they do not choose to do so, the presumption is that *the mischief done by a restriction of power is less than would arise by its extension*. It is a choice between two evils, choosing the least.

The same remark will apply to grants of judicial power; the grant is not to be extended by construction beyond its fair terms. If mischief ensues in individual cases, it is better to bear that than the greater evil of extending the power. If I am correct in the foregoing views, then, inasmuch as the ten days allowed by the rule elapsed before this motion was made, it cannot be entertained. It will undoubtedly operate harshly upon the defendant in this case; but I am satisfied that if he is entitled to any relief, it must be obtained by some other proceeding.

*Motion denied.*

#### THE ORIENTAL.

(District Court for Ohio: 2 Flippin, 6-8. 1877.)

Opinion by WELKER, J.

STATEMENT OF FACTS.—At the January term, 1876, of this court (on 22d February), this cause came on for trial on the issue, the respondents and claimants or their proctors not being present. The libelant demanding a trial, the same was had and a decree entered for him. Notice of appeal was entered by order of the court on behalf of claimants and respondents. No appeal was taken. Afterward at the April term, 1876, of this court, to wit, on the 4th day of May, the claimants and respondents filed a motion to set aside the decree for the reason that the hearing upon which the same was rendered, and its rendition, was a surprise upon the respondents and proctors in the cause. This cause was commenced on the 3d day of October, A. D. 1870. The claim of the respondents and their answer were filed on the 21st day of November, A. D. 1870, and had been continued from term to term until the term at which it was tried. Numerous affidavits are filed in support of the motion, and also affidavits against it.

It appears in substance from the affidavits of the respondents, that their proctors resided at Detroit, and those of the libelants at Cleveland. That Moore & Griffin, who reside at Detroit, as proctors for the libelants, had served notice upon respondents' proctors to take depositions at Detroit in 1873 and in 1874; that depositions were taken under that notice by Moore & Griffin; that ever since this cause was commenced the proctors of the respondents had the constant assurance from Mr. Moore, one of the firm, that notice would be

given them of the trial of the cause, and that reliance was placed upon that assurance, and no such notice was ever given.

It also appears that Moore & Griffin were only employed to take the testimony at Detroit, and were not present at the trial or knew of it, trial being conducted by the proctors of record at Cleveland. Affidavits were also presented by libelants, tending to show notice of intent to demand trial at the January term; and others on behalf of respondents denying any notice. No allegations are made of any fraud practiced by libelants or their proctors, except the failure of Moore to give notice to respondents' proctors of intent to demand a hearing; nor does it appear that the proctors of record at Cleveland had any knowledge of the arrangement with Moore as stated.

But the view I take of the motion makes it unnecessary to consider the affidavits on either side. The motion is made after the term at which the trial was had and decree entered. Can a decree be thus set aside at a subsequent term of the court? Or should a motion for that purpose be considered when not filed at the term?

§ 447. *A decree in admiralty will not be set aside at a subsequent term on motion.*

There are numerous authorities for setting aside decrees *pro confesso* in chancery obtained by fraud at a subsequent term, but only on petition filed in regular form for that purpose, and on which evidence can be taken in the regular way to establish the fraud. But I find no case in admiralty where a decree on a hearing was set aside on motion at a subsequent term. By general admiralty rules 29 and 40, it is provided that the court may, in its discretion, upon the motion of the defendant and payment of costs, rescind a decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered.

In an early case, *The Illinois*, Judge Wilkins, of the eastern district of Michigan, refused to set aside a decree after the lapse of ten days, in a case where the decree had been entered up in the absence of the respondent or his proctor, who was at the time engaged in trying a case in one of the country circuits; holding that he had no power to do so after the lapse of ten days. This rule was adopted in the case of *Northop v. Gregory*, 2 Abb., 503, by Judge Longyear, of the same district, holding that a motion to open a decree in admiralty entered by default must be made within ten days after the entry of the decree. These decisions, in a recent case decided by Judge Brown, *Thompson v. Carson*, of the same district, were cited and approved by him — (manuscript).

The general rule is that, after the adjournment of the term, courts have no power to change their judgment or decree on a mere motion. Other machinery has been devised in the law to correct errors at subsequent terms which must be used for that purpose. This motion, not having been filed until after the adjournment of the January term, cannot therefore be granted, and must be overruled.

ALBERS v. WHITNEY.

(Circuit Court for Massachusetts: 1 Story, 810-814. 1840.)

STATEMENT OF FACTS.—Motion to correct the record and judgment by inserting John H. Albers in place of James H. Albers, it being alleged that the name was written James H. by a clerical error.

§ 448. *Power to amend judgments under the judiciary act.*

Opinion by STORY, J.

The power of this court to grant amendments is dependent upon statute; and, so far as has been provided for, it is by the thirty-second section of the judiciary act of 1789, chapter 20. That section provides, "That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed, or reversed, for any defect or want of form; but the courts shall respectively proceed and give judgment according as the right of the cause and matter of law shall appear to them, without regarding any imperfections, defects or want of form, in such writ," etc., except only such as the party shall specially set down by demurrer as causes thereof. The courts are further authorized from time to time to amend all such imperfections, defects, and want of form, other than those set down by demurrer. The statute then proceeds to declare, that the courts "may at any time permit either of the parties to amend any defect in the process or pleadings (not adding, as in the preceding part of the section, 'judgments and proceedings'), upon such conditions as the said courts respectively shall, in their discretion and by their rules, prescribe."

§ 449. *Mistake in Christian name of plaintiff not apparent on the record.*

Now, upon the foundation of this section, no authority is given to the courts of the United States to make any amendments in judgments, except as to defects and want of form. In the present case, the amendment is not of any matter or defect of form. The form of the declaration is right. The defect proposed to be remedied is a mistake of *fact* in the Christian name of one of the plaintiffs. This mistake, too, is not apparent on the record, nor is it to be amended by any matter, apparent upon other parts of the record. But it is to be made out upon affidavits and evidence *aliunde* to establish the fact. There is, therefore, nothing on the record to amend by.

§ 450. *Amendment of judgments at common law.*

It is plain that at the common law no judgment was amendable after the term at which it was entered. And amendments could be made in the process, pleadings and proceedings only while the cause stood in paper and before judgment. The authority to amend, then, even in England, in cases of this sort, is dependent upon and limited by statute. Mr. Tidd, in his excellent work on practice, has laid this down, as the clear doctrine of the courts, in all cases of ordinary suits (excluding fines and recoveries) in the English courts of justice. 1 Tidd, Pract. (9th ed. 1828), 711, 712. Judgments and records are there never allowed to be amended except, in the first place, where the case is within the reach of some statute; or, in the next place, where there is something to amend by, that is, where there is some memorial, paper or other minute of the transactions in the case from which what actually took place in the prior proceedings can be clearly ascertained and known. *Id.*, 713, 714. In the case before us there has been no mistake in the prior proceedings. The mistake is in a fact that never was brought out in the prior process, or pleadings, or proceedings in the cause. It is a mistake, *dehors* the record and proceedings, a mistake in the Christian name of one of the plaintiffs, which could not be made apparent except by some plea which should have disclosed it. If known to the defendants they waived the objection and submitted to have a judgment against them by default.

§ 451. *A mistake in the Christian name of the plaintiff is not amendable, and is not material.*

It appears to me, then, that this is not a case for any amendment authorized to be made by this court. Neither do I perceive in what respect the purposes of justice would be aided by the amendment. On the contrary, as one of the defendants has been committed on the execution which issued on the judgment and has been discharged under the poor debtors' act from his imprisonment, there might be danger that the court might, by the amendment, do injustice or injury to him. Suppose a new execution to issue after the amendment, might not that defendant be taken anew in execution notwithstanding his former discharge? I do not say that he could. But we ought not to subject him to the hazard.

Besides, the amendment does not seem necessary for any reasonable object. The judgment, as it stands, concludes all the defendants as to the very defect in controversy; and it is not now open to them to contest the fact that the plaintiff's name was as stated in the writ and declaration; at least, so far as this judgment is concerned its validity on this point cannot be questioned.

*Motion overruled.*

§ 452. *Opening decree.*—An interlocutory decree will not be opened where the right of the parties would be fully settled by an adjudication at law to the same effect as the decree. *Ingersoll v. Benham*, 14 Blatch., 362.

§ 453. From the minutes of the district court of the southern district of California it appeared that the judge announced an opinion overruling exceptions and confirming a survey of a Mexican grant, but no formal decree was ever entered and no decree was filed. *Held*, that there was no final adjudication of the case, and that the court to which the records of the district court were transferred could, on a showing such as would justify a new trial or a rehearing, or sustain a bill of review, open the case and examine it on its merits. *United States v. Gracia*, 1 Saw., 383.

§ 454. A decree of the district court will not be opened and leave given to file an amended answer, on the ground that after the decision it was discovered that prior thereto the circuit court had ruled differently on the issues involved therein. The proper remedy is by appeal. *Thomassen v. Whitwell*, 9 Ben., 458.

§ 455. When a case was improperly before the supreme court for want of jurisdiction, but no exception was taken by motion, if it afterwards came before the supreme court that court had no power to review its former decision, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. *Washington Bridge Co. v. Stewart*, 3 How., 418.

§ 456. A joint decree was rendered against A. and B., administrators of C., and his principal devisees and legatees, for a sum of money. Before the decree was satisfied A. died, having appointed B. his own executor, who qualified as such. A bill was filed to revive the decree against B., both in his character of surviving administrator of C., and as executor of A. B. also died without answering the plaintiff's bill, and a bill of revivor was filed against his administrator, and also against the administrator *de bonis non* of A. These last defendants having answered this bill the court directed them to settle their accounts of their administration of the estates of B. and A., respectively, and also of the administration of B. and A. of the estate of C., but did not require an account of the administration of the estate of A. by B., his executor. The commissioner, after due notice to the defendants, proceeded to execute the decretal order of the court, the defendants failing to attend and report the proportions by which the original decree ought to be charged on the estates of A. and B. At the same term to which this report was made the report was affirmed and the matter thereof decreed, no counsel appearing for the defendants. Subsequently one of the administrators *de bonis non* of A. applied for an injunction to stay proceedings under the last-mentioned decree, so far as it affected the estate of A. *Held*, that this decree was not a final decree, so as to preclude the court from opening it to let in the real merits, which may have been excluded by any excusable misapprehension of the party, or error or irregularity of the court. *Coates' Executrix v. Muse's Adm'r*, 1 Marsh., 530.

§ 457. *Setting aside judgment.*—If a judgment is pronounced against a defendant who was not served with process, upon an unauthorized appearance for him by an attorney-at-

law, the remedy is in the same court which pronounced the judgment by motion to set it aside and stay the execution. *Field v. Gibbs*,\* *Pet. C. C.*, 155.

§ 458. In an action against two defendants, if one be taken and issue joined, and plea waived and judgment confessed against him after the other has been taken and before the cause is at issue against him, the judgment may be set aside for irregularity, and the two cases consolidated and the issues made up and set for trial. *Hyer v. Hyatt*, 2 *Cr. C. C.*, 633.

§ 459. A failure to give security for costs, under the general rule of the court, is no cause for setting aside a judgment; nor is the apprehension of counsel, under ordinary circumstances, ground for doing so. *Lytle v. Fenn*, 8 *McL.*, 411.

§ 460. A very slight amendment of the declaration, which in no respect affects the merits of the case, is not an irregularity that will authorize the court to set aside a judgment thereupon rendered. *Spofford v. Ritten*, 4 *McL.*, 253.

§ 461. Upon motion of the special bail, at the return of the *scire facias*, the court will set aside the original judgment against the principal, for irregularity, and will quash the *scire facias* against the bail. *Ault v. Elliott*, 2 *Cr. C. C.*, 872.

§ 462. Money paid according to an award of a tribunal specially clothed with jurisdiction of the subject-matter, and from whose decision there is no appeal, is, in legal effect, paid under a judgment, and an action of *assumpsit* cannot be maintained to recover it back, because a judgment cannot be set aside in that way. *New England Mississippi Land Co. v. United States*,\* 1 *Ct. Cl.*, 135.

§ 463. In a joint action against two defendants, after judgment confessed by one of the defendants, it is too late for him to move to set aside the judgment because the *capias ad respondendum* was not renewed and regularly returned *non est inventus* at every term until the trial term of the case against the defendant taken. *McCandless v. McCord*, 4 *Cr. C. C.*, 533.

§ 464. Where a judgment is confessed and an assignment of goods made to secure it, and the defendant confessing the judgment has no authority to bind the other defendants, all members of the same firm, and the goods assigned are afterwards absorbed by a previous mortgage, it is proper to vacate the judgment. *Clark v. Bowen*,\* 22 *How.*, 270.

§ 465. — *married woman*.— A judgment will be set aside, on motion, at any time before the satisfaction of the judgment, and during the existence of the coverture, if it appear by affidavits that defendant at the time the judgment was rendered was a married woman. The judgment might also be reversed by a writ of error *coram nobis*. *Albree v. Johnson*, 1 *Flip.*, 841.

§ 466. *Setting aside decree*.— It is one of the earliest rules of chancery, that no decree after enrollment can be reversed, annulled or set aside, but on a bill of review for error apparent or new matter discovered. *Scott v. Blaine*,\* 1 *Bald.*, 287.

§ 467. A decree in chancery, though not entered in term time, will only be set aside on a bill filed and on terms, where it was entered in pursuance of a stipulation which has been strictly followed, and money has been paid and property has changed hands on the strength of it. Such decree will not be summarily set aside on motion. *Bayerque v. Jackson Water Co.*, *McAl.*, 85.

§ 468. A decree *pro confesso*, when irregularly entered, as a matter of course will be set aside on motion. *Fellows v. Hall*, 3 *McL.*, 281.

§ 469. Where a decree *pro confesso* is taken before the expiration of the time given to the defendant to answer, it is irregular, and will be set aside on motion. *Fellows v. Hall*, 3 *McL.*, 487.

§ 470. *Amending verdict*.— Where the jury found a verdict in general terms for the plaintiff in a suit upon a promissory note, without finding the amount due, which the laws and practice of Louisiana require them to do, and the court then gave judgment for the amount of the note, this would have been adjudged to be a cause of reversal of the judgment by the supreme court of the state of Louisiana, but cannot be held so by the United States supreme court. By the common law, although a judgment in such a case might not have been strictly proper, yet under a power of amending the verdict, the judgment can stand, because the plea having been that no consideration was given for the note, and the verdict being for the plaintiff, it necessarily found that the whole amount was due. *Parks v. Turner*, 12 *How.*, 39.

§ 471. *Amending judgment*.— An incomplete judgment may be amended from the record at any time as a matter of course. The record imports verity, and the court can control its proceedings so as to make one portion of the record in which there is a clerical error, or an immaterial omission, conform to another part of it which supplies the omission or remedies the defect. Thus a judgment leaving the amount of interest blank may be amended from the verdict, which gives interest from a certain day. *Plant v. Gunn*,\* 7 *Fed. R.*, 751.

§ 472. In England various statutes allow the courts to amend their judgments where they could not do so at common law, but this constitutes no rule of action for the courts of the United States. *Brush v. Robbins*,\* 3 *McL.*, 483.

§ 473. A court may alter its judgment at any time before it is entered up; or, if entered, before it is made final to be carried into effect. But it should not be altered without notice to both parties, if it has before been amended, nor without the full hearing and adequate causes which take place and justify rehearings in chancery. *Doggett v. Emerson*, 1 Woodb. & M., 1.

§ 474. A judgment affirmed in an appellate court in the name of one of two parties, when it ought to have been affirmed in the name of the two as partners, may be corrected upon motion. *Coelle v. Loekhead*,\* *Hemp*, 194.

§ 475. Where the clerk of the supreme court had omitted to enter the judgment of that court, allowing the defendant in error, on the affirmance of the judgment of the circuit court, interest at the rate of six per cent. per annum as damages, and the mandate of the supreme court, although issued, had not been presented to the circuit court, on motion, the court ordered the judgment to be reformed, allowing interest at the rate of six per cent. *Bank of Kentucky v. Wistar*, 8 Pet., 441.

§ 476. An error in entitling a judgment in the district court, when it was rendered in the circuit court and there proceeded on, and no other suit was pending between the parties, and no one was misled, will be amended *nunc pro tunc*. *Fourth National Bank of Chicago v. Neyhardt*, 13 Blatch., 393.

§ 477. The maxim, that equity looks upon that as done which ought to have been done, has no application to errors and omissions in judicial records. *King v. French*,\* 2 Saw., 445.

§ 478. Amendments of error in judicial proceedings must be made in the court in which the errors occurred; they cannot be made in a case removed to a federal court. *Ibid*.

§ 479. After judgment, the parties are still in court for the purpose of giving effect to it. And in the action of ejectment, the court having power to extend the demise after judgment, the defendant may be considered in court, on a motion to amend, as well as on any other motion or order which may be necessary to carry into effect the judgment. *Lessee of Walden v. Craig*, 14 Pet., 147.

§ 480. Amending decree.—It seems that where a decree was drawn by the defendant's own counsel, any false idea entertained by him touching its legal effect is not an amendable error. Nor will it be inferred that the judge rendering the decree intended to approve anything different from what is expressed in the decree. *Coleman v. Neill*,\* 11 Fed. R., 461.

§ 481. A consent decree having been entered in a suit between an assignee in bankruptcy and an assignee under a deed of assignment, in 1877, a petition filed in 1882 by the defendant, seeking to modify the former decree essentially by the correction of an alleged mistake in its terms, which modification was intended to and would have seriously prejudiced certain of the creditors in bankruptcy, although the assignee in bankruptcy consented, was dismissed. *Ibid*.

§ 482. Interlocutory order.—Where a case in equity was referred to a master, which came again before the court upon exceptions to the master's report, the court had a right to change its opinion from that which it had expressed upon the interlocutory order, and dismiss the bill. All previous interlocutory orders were open for revision. *Fourniquet v. Perkins*, 16 How., 82.

§ 483. During term.—Both in civil and criminal matters courts have full power over their orders, judgments and decrees during the existence of the term at which they are first made, in reversing, vacating or modifying them. *Ex parte Lange*, 18 Wall., 163.

§ 484. A court has full power to modify its judgments and decrees in civil and criminal matters during the term in which they are rendered. *United States v. Harmison*, 3 Saw., 556.

§ 485. A court has the right to set aside an order and re-enter it as of the later date during the same term. *Memphis v. Brown*, 4 Otto, 715.

§ 486. Where a judgment is rendered for the plaintiff on account of the defective verification of the plea by the defendant, such judgment can only be set aside at the term at which it was rendered. *Ford v. Cornish*,\* 2 MacArth., 57.

§ 487. A court of equity has full power to vacate an order or decree, at the same term at which it has been made, on discovering that they have committed error, or that the consent of one party to such decree has been obtained by fraud and misrepresentation on the part of the other. No original bill is necessary for this purpose. *Doss v. Tyack*,\* 14 How., 297.

§ 488. A court has full power and authority, during the term at which an order was made, to reverse or modify it; and where an order sustaining a demurrer and dismissing a complaint is reversed and vacated during the same term, the jurisdiction is considered as continuing uninterruptedly, especially as against persons acting with full knowledge of the facts. *Union Trust Co. v. Rockford, Rock Island & St. L. R. Co.*, 6 Biss., 197.

§ 489. A judgment for an amount payable in gold coin may be amended during the term so that it shall be payable in gold and silver coin. *Cheang-kee v. United States*, 3 Wall., 820.

§ 490. After lapse of term.—After final judgment and at the next term it is too late to set aside verdict and judgment on motion on the ground of a supposed want of jurisdiction. *Bank of United States v. Moss*, 6 How., 31.

§ 491. After the term at which a judgment is rendered, the judgment cannot be set aside and the defendant allowed to plead. *McClelland v. Foscender*,\* 4 Ch. Leg. N., 406.

§ 492. By the common law, judgments which are not nullities for want of jurisdiction in the court rendering them cannot be set aside upon a mere motion after the term at which they are rendered. In modern practice relief is given on motion where formerly a writ of *audita querela* was necessary. But this does not apply to the solemn judgments of the court. *Wood v. Luse*,\* 4 McL., 254.

§ 493. At common law, a judgment which is not a nullity, and upon which execution can issue, cannot be set aside after the term at which it is rendered; and it has not been decided that this can be done under the acts of congress upon motion. *Brush v. Robbins*,\* 3 McL., 486.

§ 494. A judgment of a previous term cannot be set aside on motion. *Ibid.*

§ 495. If, after judgment, an entry be made on the clerk's docket, intimating that the judgment is for the use of a third person, the court will not interfere to order it to be stricken out, after the term in which the judgment was rendered. *Bradley v. Eliot*, 5 Cr. C. C., 293.

§ 496. The supreme court of the United States in *Cameron v. McRoberts*, 3 Wheat., 591, have decided that the circuit courts of the United States have no power to set aside their decrees in equity, on motion, after the term at which they are rendered. And a judgment stands upon the same ground in this respect as a decree. *Brush v. Robbins*,\* 3 McL., 486.

§ 497. A mistake or a clerical error in a judgment may be corrected at any time. But that which entered into the consideration of the court, and constituted part of the judgment, cannot be changed after the term. *Ibid.*

§ 498. A delay of nearly three years to move to open a judgment of dismissal of a suit before the court of claims, rendered during the civil war for a failure to prosecute, is fatal. *Figh v. United States*,\* 8 Ct. Cl., 97.

§ 499. Although costs are improperly awarded a plaintiff on a judgment for less than \$500, yet such costs will not be retaxed at a subsequent term. *Crabtree v. Neff*, 1 Bond, 554.

§ 500. No court can reverse or annul its own final decrees or judgments for errors of fact or law after the term in which they have been rendered, unless for clerical mistakes. *Ex parte Sibbald v. United States*, 12 Pet., 488.

§ 501. Where a defendant in a suit for the infringement of a patent is notified of the entry of the decree against him, and pays in full an execution issued against him for the taxable costs, he will not be allowed, eleven months afterwards, to move to set the decree aside or to open it to let in a defense. *Doubleday v. Sherman*, 6 Blatch., 513.

§ 502. A bill was filed against A., B. and C. Before answer filed A. died, which fact was alleged in the answer of B. and C. Subsequently B. died, but no suggestion of his death being entered, a final decree was rendered against B. and C. jointly. It was held that a motion to set aside the decree as to both B. and C. being made more than two terms after decree rendered on hearing and argument, and issue regularly made up, would not lie, and was overruled. *Scott v. Blaine*,\* 1 Bald., 287.

§ 503. An appeal will not lie from the refusal of a court to open a former decree; nor have the United States circuit courts power to set aside their decrees in equity, on motion, after the term at which they were rendered. *McMicken v. Perin*, 18 How., 507.

§ 504. Although a court has power at a subsequent term to set right mere forms in its judgments, correct misprisions of its clerks, and any mere clerical errors, so as to conform the record to the truth, and in some cases irregularities also in notices, mandates and similar proceedings, it cannot, for a mere error in law, revise or annul a decree at a subsequent term in a summary way on motion. The only relief for errors in law in such cases is by review, writ of error or appeal. *The Bank v. Labitut*, 1 Woods, 11.

§ 505. A final decree in equity will not be modified on motion after the expiration of the term at which it was rendered, where such modification will affect the rights of certain parties in interest. *Coleman v. Neill*,\* 11 Fed. R., 461.

§ 506. Decrees are final after the end of the term at which they are rendered, unless specially entered otherwise; and they are final after entered up as final on some day before the end of the term, with a view to other proceedings upon them as final decrees. Especially are they not to be altered when so entered by agreement of the parties. *Jenkins v. Eldredge*, 1 Woodb. & M., 61.

§ 507. A judgment of condemnation may, for irregularity, be set aside at a subsequent term. *Jones v. Kemper*, 2 Cr. C. C., 535.

§ 508. A judgment entered by the clerk by mistake was set aside at the next term and the execution quashed. *United States v. McKnight*, 1 Cr. C. C., 84.

§ 509. A judgment against the casual ejector is different from an ordinary judgment, and may be set aside for good cause, after the expiration of the term at which it was entered. *Lytle v. Fenn*, 8 McL., 411.



§ 510. In a joint action against two defendants, if one only be taken on the first writ, and the other be taken on a subsequent writ, and the plaintiff, not knowing that this other had been taken, alters his declaration by stating that he had not been taken, and proceeds to judgment against the defendant first taken, the court will, at a subsequent term, permit the judgment to be set aside and the declaration to be restored to its original form, and the cause to proceed as a joint action against both. *Newton v. Weaver*, 2 Cr. C. C., 685.

§ 511. The court will set aside a judgment against a garnishee, obtained at a former term by surprise, and will quash the execution thereon issued. *Homans v. Coombe*, 2 Cr. C. C., 681.

§ 512. Where a federal court rendering judgment was without jurisdiction, the judgment may be set aside on motion at a subsequent term. *Shuford v. Cain*, 1 Abb., 302.

§ 513. A judgment for the defendant in replevin, without a declaration, is irregular, and will, on motion, be set aside, even at a subsequent term. *Ringgold v. Eliot*, 2 Cr. C. C., 462.

§ 514. The amendment of a judgment or a decree so as to make it conform to what was the purpose and intention of the court and the justice of the case is a power that is exercised by all courts, at all times, while the record remains before them, and the proceedings are *in fieri*. But the opening, setting aside or vacating a judgment upon a motion, after an intervening term, is a rare exception to the general practice. *Figh v. United States*,\* 8 Ct. Cl., 97.

§ 515. A court has power to render judgment at the next term after a verdict when the clerk has neglected to do so at the time, and may thereafter amend the judgment by inserting the names of all the parties named in the verdict. *Comanche Mining Co. v. Rumley*, 1 Mont. Ty., 201.

§ 516. There was no regular judgment entered upon the docket on the writ of *scire facias* in this case, in Pennsylvania, but a writ of *levari facias* was issued, and the property levied upon and sold in 1820. In 1836, the court ordered the record to be amended by entering up the judgment regularly, and by altering the date of the *scire facias*. Held, that the court had power to amend its record in 1836. *Slicer v. Bank of Pittsburg*, 16 How., 571.

§ 517. If a decree be not actually entered till after the judge dies who drew it up and announced it, an entry of it may be made at the next term. *Doggett v. Emerson*, 1 Woodb. & M., 1.

§ 518. Where a judgment has been entered by mistake, it cannot be vacated at a subsequent term, unless it was entered by misprision of the clerk, by fraud, or the like. *Medford v. Dorsey*,\* 2 Wash., 438.

§ 519. Where a judgment is obtained and entered through a mistake of the clerk, it will be set aside and execution quashed at a subsequent term. *Pierce v. Turner*,\* 1 Cr. C. C., 438.

§ 520. Where there has been a mistake in a decree, it may be corrected even after the expiration of the term of the court at which it was rendered. *United States v. Castro*, 5 Saw., 625.

§ 521. Where an error was discovered in a decree of the court, after the expiration of the term at which it was enrolled, it was held that such error could be corrected on motion. Thus, where it was ordered that the decision of a board of commissioners be confirmed, and a decree be drawn accordingly, and after the expiration of the term it was discovered that, through error or accident, the description of the land contained in the decree was different from that contained in the decision of the board, it was held that the decree might be amended: the court holding that if the application were intended to procure a revision and correction of errors, either in law or fact, or to change opinions once given, or to obtain a new decision, it would be denied. (Citing *Marr v. Miller*, 1 Hen. & Munf., 204, and *Kemp v. Squire*, 1 Ves. Jr., 205.) *United States v. Bennett*,\* 1 Hoff., 281.

§ 522. A judgment irregularly obtained will be set aside at a subsequent term. *The Bank v. Crittenden*,\* 2 Cr. C. C., 238.

§ 523. In a suit against a collector of customs to recover back money paid under protest, a judgment was rendered and paid in 1862, and on the discovery of error by the plaintiff, the judgment was opened on motion in 1867. *Crookes v. Maxwell*,\* 6 Blatch., 468.

§ 524. Judgments by default will not be set aside unless the defendant can show that he was guilty of no negligence in suffering the judgment and has a meritorious defense. *Dawson v. Daniel*,\* 2 Flip., 301.

§ 525. A judgment by default, and a writ of inquiry, in the county of Washington, District of Columbia, may be set aside at the next term, upon affidavit of merits, payment of costs, pleading to issue to the merits instant, and offering ready for trial. *Reiling v. Bolier*, 3 Cr. C. C., 212.

§ 526. An affidavit of merits is not necessary on a motion to set aside a judgment by default irregularly entered. When the counsel of a defendant in ejectment requested the clerk to enter his appearance, who promised to do it, a subsequent judgment by default on a rule to plead in twenty days is irregular. *Sheepshanks v. Boyer*, Bald., 462.

§ 527. Where the United States circuit court for the southern district of Mississippi gave

judgment by default against a defendant, who had not been served either in conformity with the Mississippi statute or the rule of the court, and an execution was issued, upon which a forthcoming bond was given, and another execution issued, and at a subsequent day the court quashed the proceedings and set aside the judgment by default, this order was correct. *Harria v. Hardeman*, 14 How., 334.

§ 528. It is well settled law in Virginia that where a decree is taken by default because of the neglect of defendant's counsel, it cannot be opened on a motion for rehearing, but only on a bill of injunction. Such being the law, it will be observed in the United States circuit court sitting in Virginia. *Scott v. Hore*, 1 Hughes, 163.

§ 529. An office judgment may be set aside on the plea of "never executrix." *Alexander v. West's Executrix*, 1 Cr. C. C., 88.

§ 530. To set aside an office judgment, the court will not permit the defendant to plead specially matter which may be given in evidence upon the general issue. *Vowell v. Lyles*, 1 Cr. C. C., 329.

§ 531. On motion to set aside an office judgment upon an injunction bond, the court will not suffer the defendant to plead that the obligee was dead at the time of the execution of the bond. *Porter v. Marsteller*, 1 Cr. C. C., 139.

§ 532. Variance between the *capias* and declaration cannot be pleaded to set aside an office judgment. *Hartshorne v. Ingle*, 1 Cr. C. C., 91.

§ 533. Decision on motion.—The decision of a court on a motion made in the progress of a case is not a judgment in the sense that precludes a re-examination of the same matter subsequently, especially upon an enlarged state of facts. *Ackerly v. Vilas*,\* 16 Int. Rev. Rec., 154.

§ 534. Decree *nunc pro tunc*.—Where a judicial sale has taken place without any final decree, such a decree cannot be entered *nunc pro tunc* where no order of sale was actually made at the time. *Gray v. Brignardello*, 1 Wall., 627.

§ 535. Arrest of judgment.—If the verdict be general, and one of the counts be bad, the judgment must be arrested; and the court will not, after the verdict has been recorded, order it to be amended by applying it to the good count only, unless the evidence given was applicable only to that count. *Fenwick v. Grimes*, 5 Cr. C. C., 439.

§ 536. Error *coram vobis*.—An action of debt is brought on a bond; the verdict, as rendered by the jury, is for the penalty to be discharged by the sum expressed in the condition, with interest till paid; but by the misprision of the clerk the verdict is entered for a smaller sum as damages, without interest, and the judgment is entered for the penalty to be discharged by those damages without interest. It seems that for this misprision the judgment might have been reversed by writ of error *coram vobis*. *Alston v. Munford*, 1 Marsh., 266.

§ 537. In admiralty.—An admiralty court of original jurisdiction has power to vary its own decrees; but in American practice the summary process by motion for a rehearing is inapplicable after the term has passed. *Snow v. Edwards*, 2 Low., 273.

§ 538. Admiralty rule 40 of the supreme court limits the summary jurisdiction to rehear, in defaulted actions, to ten days, regardless of terms of court; but after the ten days in defaulted cases, and after the term has gone by in all ordinary cases, the court will entertain a libel of review. *Ibid*.

§ 539. A court of admiralty will not, except with the free consent of all the parties to be affected, grant a rehearing or modify its definitive decree after the term in which the decree is rendered. So a decree made on a rehearing without such consent, modifying a final decree made at a previous term, was held to be a nullity. *The Martha*, Bl. & How., 151.

§ 540. A libel was dismissed for default, and by order of court the bond for costs and of the sureties for the production of the property was canceled. *Held*, that the cause might be reinstated, and that the decree and order of cancellation might be set aside and that the sureties still be liable. *The Brig Antelope*, 1 Ben., 343.

§ 541. Under a rule of the court, ten days are allowed the defendant in which to move a rescission of a decree by default in admiralty, and a motion made seventeen days after will not be entertained. *Northrop v. Gregory*,\* 2 Abb., 503.

§ 542. A motion to rescind a decree entered by default must be accompanied by the answer which it is proposed to file, or the facts to be set up by way of defense divulged, that the court may judge of their relevancy or meritoriousness, if proven. *Ibid*.

§ 543. In bankruptcy.—A district court sitting in bankruptcy has the same power as other courts to open a final decree, rehear a cause and change or reverse a judgment or decree during the term; but after the term has passed there must be plenary proceedings by bill or libel of review. *Re Dupee*, 2 Low., 18.

§ 544. The power of a court to recall a final decree in bankruptcy will be exercised in a case where the counsel opposing the discharge of the bankrupt was prevented from being at the hearing by unavoidable accident, thus preventing the creditors from presenting their case, showing actual fraud on the part of the bankrupt. *Ibid*.

## III. SUITS TO IMPEACH, SET ASIDE OR ENJOIN.

**SUMMARY**—*Bill to review proceedings for fraud*, § 545; *jurisdiction*, § 546.—*Federal and state courts*, § 547.—*Where the decree has been executed*, § 548.—*Relief in equity*, § 549.—*Usurious and gaming transactions*, § 550.—*Recovering back money paid on erroneous judgment*, § 551.

§ 545. A bill to review the proceedings in a cause with a view to impeach the decree rendered therein for fraud practiced by the parties in obtaining it is neither an original bill nor a bill of review, but is an incident of the original suit. *Osborn v. Michigan Air Line R. Co.*, §§ 552-56.

§ 546. Although a decree may in a proper case be impeached collaterally for fraud in another court than the one which rendered it, yet no other court can take jurisdiction of a suit brought for the purpose of impeaching a decree, whether for fraud or other cause. *Ibid.*

§ 547. The circuit courts of the United States, and the state courts, are as to each other foreign forums, and neither can entertain a suit brought for the purpose of declaring void a judgment or decree of the other. *Ibid.*

§ 548. It cannot be objected to a bill to impeach a decree of the same court for fraud that such decree has been executed. The party complaining of the former decree may be put in the same situation in which he would have been if the decree had not been executed. *Ibid.*

§ 549. It is one of the ordinary functions of a court of equity to relieve against judgments at law where a proper case is made out. *Thomas v. Watson*, §§ 557-64.

§ 550. Where there has been a voluntary confession of judgment upon notes given to secure usurious interest or money won at play, the judgment debtor or his assignee in insolvency under the insolvent law may maintain a suit in equity to enjoin the execution of the judgment upon the ground that usurious and gaming transactions are made illegal and void by statute. This is analogous to the rule allowing the recovery of money paid on such transactions. The rule is otherwise, however, where the defense is set up in the action in which the judgment is rendered. There the judgment concludes the question. *Ibid.*

§ 551. Money paid upon an erroneous judgment may on the reversal of such judgment be recovered back. This may be done by a writ of restitution, *scire facias*, or under some circumstances by an action at law. But whatever is done under the judgment while it is in force is valid and binding so far as third persons are concerned. Thus where the money has, while the judgment is in force, been paid to the agent of the judgment creditor, the debtor cannot, upon the reversal of the judgment, recover the amount from such agent, although such payment was accompanied by a notice of intention to prosecute a writ of error to reverse the judgment. *Bank of the United States v. Bank of Washington*, §§ 565-68.

[NOTES.—See §§ 569-607.]

## OSBORN v. MICHIGAN AIR LINE RAILROAD COMPANY.

(Circuit Court for Michigan: 2 Flippin, 508-507. 1879.)

Opinion by WITHEY, J.

**STATEMENT OF FACTS.**—Complainant was a stockholder in the Michigan Air Line Railroad in 1873, when suit was commenced in this court to foreclose a mortgage made by that corporation to secure bonded indebtedness. Scammon, a trustee, was plaintiff, and the corporation and others defendants. The railroad corporation, by its directors, appeared and answered, and proofs were taken. At the hearing, in January, 1875, a decree was entered against the company for \$265,000, and for a sale of its road. The sale took place in June of last year, defendant Young being the purchaser at \$25,000. In November following, the road was reorganized by Young and his associates, under the name of the Michigan Air Line Railway Company, with a capital of \$300,000.

The bill now before the court was filed in October, 1877, by the complainant in his own behalf, and of all other stockholders who might come in under his bill, for the purpose of impeaching the decree for fraud and collusion on the part of plaintiff and officers of the defendant railroad company in that

suit. The particular fraud is stated to be a fraudulent agreement, signed and introduced at the hearing, admitting the indebtedness which was decreed. The prayer is that the decree be declared fraudulent and void, and that the sale be set aside. Other matters are stated in the bill not necessary to refer to, except that it is stated, as an excuse for delay in bringing this bill, that complainant was ignorant of the foreclosure suit, and did not discover the fraud until after the decree had been executed, from which time he had been diligent, etc. It should further be said that the bill alleges notice of the alleged fraud to the purchaser under the foreclosure sale, to those who are connected with him in the new corporation, and to the corporation itself. It also appears by the bill that complainant is a citizen of Michigan, and that both the defendant corporations named in the suit are Michigan corporations, and were citizens of the same state as complainant.

§ 552. *Jurisdiction; citizenship; bill to impeach decree.*

Demurrers were interposed, under which several questions have been presented for consideration. The most important is jurisdictional, growing out of the citizenship of the parties referred to. The fact that complainant and necessary defendants are citizens of the same state will defeat jurisdiction in this court in any case depending upon the terms of the act of congress defining the original jurisdiction of the circuit courts of the United States. In other words, if this is purely an original bill, then jurisdiction exists only when the plaintiff and necessary defendants are citizens of different states. Again, if this is purely a bill of review, there is no jurisdiction, inasmuch as more than two years elapsed after the decree was rendered before this bill was filed; and for this reason all matters that point to errors in the decree are improperly presented by this bill.

I entertain the opinion that the question whether this bill can be entertained is not dependent upon the citizenship of the parties; and, also, that this is neither purely an original bill nor a bill purely of review. It is believed to partake of the nature of an original bill, having for its object the review of the proceedings in the original cause, in order to ascertain whether the decree therein should be impeached for fraud alleged to have been practiced by the parties in obtaining it. Story's Eq. Plead., sec. 426. If no other court can entertain a bill or suit, brought for the purpose of impeaching such decree for fraud, then this bill is necessarily brought here, and may, therefore, be said to be the outgrowth of the original suit — an incident of it — from jurisdiction over which flows the jurisdiction to entertain this bill, without reference to the citizenship of the parties.

§ 553. *Where a bill is brought to declare void a decree rendered in this court for fraud or otherwise, this court is the only one which can take cognizance of such a bill.*

It is not doubted that in a proper case the decree sought to be impeached by this bill could be impeached collaterally for fraud in another court; but it is believed that no other tribunal can properly take jurisdiction of a suit brought for the purpose of declaring such decree void, whether for fraud or otherwise. The circuit courts of the United States, and the courts of the state, are essentially, as to each other, foreign forums. Neither can entertain a suit brought for the purpose of declaring fraudulent and void a judgment or decree of the other, precisely as neither can entertain a suit brought for the purpose of declaring fraudulent and void a judgment or decree of the court of king's bench of England. The judgment in *Amory v. Amory*, 12 Am. L.

Reg. (N. S.), 585, is not believed to conflict with the views expressed. See, also, p. 39, same case.

§ 554. *A party having an interest may intervene irrespective of citizenship.*

It has been frequently ruled in the courts of the United States, as was shown by cases cited upon argument, that a person having an interest, though not a party to the suit, may intervene to assert his rights, without reference to the citizenship of the parties. *Freeman v. Howe*, 24 How., 460 (COURTS, §§ 255-60); *Buck v. Colbath*, 3 Wall., 345; *Jones v. Andrews*, 10 Wall., 333 (COURTS, §§ 883-86); 14 Wall., 82; 15 Wall., 195; 22 Wall., 252; *Campbell v. Railroad Co.*, 1 Woods, 368. See, also, *Forbes v. Railroad Co.*, 2 Woods, 323 (CORP., §§ 576-84).

§ 555. — *the rule when the decree has been executed.*

But it was claimed that when the decree has been executed, no such auxiliary or incidental proceedings can be had. It does not appear to me that there should be any such limitation. No cases are found supporting that view. Indeed, no case like the present has been found or cited. Certain it is, where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution, the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed. *Milford and Tyler*, 6 Pl. & Pr. in Equity, p. 186; *Adams' Eq.* (Am. ed.), 832; *Story's Eq. Pl.*, sec. 426.

What the effect would be if the purchaser at the sale in execution of such decree had no knowledge of the fraud there is no occasion to decide, in view of the averment of this bill that there was notice. See *Shelton v. Tiffin*, 6 How., 183-186, as to when a purchaser is protected. Without further discussion, the objection taken on the ground of want of jurisdiction is overruled. The question is not clear from doubt, but this is my judgment.

§ 556. *Defective pleading; demurrer; leave to amend; costs.*

In conclusion, the bill is regarded in other respects substantially defective in making a case for relief. It is not only singularly vague and uncertain in its statements, but lacks essential averments to make a case for the relief prayed. These defects were pointed out by counsel for defendants, and will not now be repeated. I have thought possibly complainant might obviate all the objections to which his bill is obnoxious by amendments, and for that reason have indicated that upon a proper bill the court would entertain jurisdiction. The demurrers are sustained for the reason stated. Leave, however, is given to complainant to amend his bill within thirty days, if he shall be advised that a case for relief can be presented. Costs are to the respective demurrants, including the usual solicitors' fees to each.

THOMAS v. WATSON.

(Circuit Court for Maryland: Taney's Decisions, 297-309. 1846.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—The court has taken time to examine this case with care, because the points raised in it are important, and some of them do not appear to have been fully settled by judicial decisions.

The case, as it comes before the court, is this: James Murray Lloyd, named in the proceedings, gave two promissory notes to Watson, the defendant, upon which a suit was afterwards instituted in this court, and judgment confessed by Lloyd, on the 18th of April, 1844, with an agreement entered on the record

that no execution should issue on the judgment, provided the amount was paid by the defendant in four equal annual instalments, counting from the day of entering the judgment, and, in case of default in any instalment, execution to go for the whole sum then due. On the 15th of August, 1845, Lloyd petitioned for the benefit of the insolvent laws of Maryland, and the complainant in this case was duly appointed his permanent trustee for the benefit of his creditors. Default having been made by Lloyd in the payment of the instalments hereinbefore mentioned, Watson issued an execution for the amount due on the judgment, which was levied upon lands held by Lloyd at the date of the said judgment; and thereupon, on the 18th of December, 1845, the complainant, as trustee, filed this bill, and obtained from the district judge the injunction now in question.

Since the injunction issued, the answer of defendant has come in, and upon the facts stated in the answer, it is unnecessary to examine any of the allegations in the bill, upon which the injunction was granted, except those which relate to the consideration of the two notes given by Lloyd to Watson, and upon which the judgment in question was confessed.

The bill charges that one of the notes was given upon a usurious, and the other upon a gambling, consideration; offers to pay the amount actually loaned by the defendant to Lloyd, with legal interest thereon; prays to be relieved from the residue of the judgment; and calls on the respondent to state what was the consideration for which the said notes were given. To this interrogatory the defendant has demurred, setting forth, as his cause of demurrer, that the consideration of the said notes was triable and determinable in the suit at law, and ought not, therefore, to be inquired into by this court, sitting as a court of chancery. The complainant excepts to this answer as insufficient, insisting that the defendant is bound to answer the interrogatory above mentioned; and the case now comes on upon the hearing of the exceptions, and upon the motion to continue the injunction.

Several points have been raised in the argument, which will be noticed hereafter, but the main question in the case is upon the effect of the judgment confessed in the action at law. The complainant, as trustee under the insolvent law, stands in the place of Lloyd; and undoubtedly the latter might, in the suit against him, have availed himself of the defenses stated in the bill, and might have barred the action of Watson by pleading the matters now insisted on. As he failed to do so, he would not, in ordinary cases, be permitted to insist on them in a court of equity, after having neglected to rely on them in the suit at law. But it does not follow that the same rule is to be applied where contracts are made, or securities taken, in violation of law or contrary to declared and established policy; and of this description are all securities, by note or otherwise, intended to secure usurious interest, or for money won at play.

In such cases the court are called upon to consider, not only the laches of the party who may have been grossly negligent in asserting his rights, but must look also to the conduct of the adverse party and determine whether it is consistent with sound principles of jurisprudence to protect him in the enjoyment of profits derived from securities taken in violation of the express provisions of a statute, and which the law declares shall be void. Undoubtedly it is within the legitimate province of courts of justice, and it is their duty in the exercise of the powers confided to them, to carry into full effect the policy of the law, when that policy is sufficiently and clearly manifested.

Nor can they suffer it to be defeated or embarrassed by the application of rules which do not belong to cases of that description, but are appropriate to another class of cases, and which have been adopted in them, for the purpose of preventing unnecessary litigation, where nothing more is concerned in the issue than the individual rights of the contending parties.

The distinction between these two classes of cases, and the different rules which govern them, have been frequently recognized where a party, by his voluntary act, has put it out of his power to use a legal defense which would have protected him from the payment of the claim. Thus, in ordinary cases of contract, if a party pays money with a full knowledge of the facts, but under the mistaken belief that he is bound by law to pay it, and afterwards discovers his error, he cannot recover it back again by any proceeding at law or in equity. Yet, in a case of usury or gaming, although he pays it not only with a knowledge of the facts, but with a knowledge of the law also, equity will relieve him and compel the adverse party to refund the money. As respects usurious interest paid to the lender, the amount paid over and above the legal interest may be recovered back again either by a suit at law or a bill in equity. 1 Fonb. Eq., B. 1, ch. 4, § 7, note k. As regards a security for money lost by gaming, it was, indeed, said by Lord Talbot that it could not be recovered, both parties being equally in fault; but that point did not arise in the case before him; it was an *obiter dictum*, when deciding upon a question of usury; and the point was decided otherwise in the case of *Rawden v. Shadwell*, Amb., 269. In the last mentioned case, a bond had been given for money lost at play, and part of the money paid upon the bond; yet the court, upon a bill filed for that purpose, decreed that the bond should be delivered up to be canceled, and the money repaid. Indeed, there can be no sound reason for distinguishing securities for money won at play from securities founded in usury, so as to give any advantages to the former over the latter; for they are both prohibited by law, both contrary to its settled policy; and while the laws against usury are intended to protect the necessitous against the oppression of the money-lender, and against hard and ruinous contracts forced upon them by their wants, the laws against gaming are founded upon a policy equally sound and clear, and are intended to discountenance and discourage a vice injurious to society and often most ruinous to the individual.

§ 557. *Upon the same principle upon which a court grants relief after voluntary payment of money it will protect against a confession of judgment.*

If, therefore, the money had been paid by Lloyd upon these two notes, it is evident that the complainant might, upon a bill filed, have recovered it back. And if a court of chancery would have interfered, after the money had been actually paid, is there any principle of equity which will prevent it from interposing, where the party has omitted to defend himself at law and confessed a judgment?

There is nothing, certainly, in the technical character of a judgment that will prevent the interposition of a court of equity, for it is one of its ordinary functions to relieve against judgments at law, where a proper case is made out in equity. And if it will lend its aid to the party, after he has acknowledged the justice of the debt by the payment of the money, there can be no sufficient reason for refusing to interpose where the party has omitted to make the defense in an action at law, and acknowledged the debt by confessing the judgment. In either case, the court acts to prevent the party from retaining an

advantage which he has obtained, under a contract forbidden by law, and to uphold an established public policy, intended, in the one case, to guard against oppression, and in the other to suppress a vice injurious to society. If the mere confession of a judgment at law would secure a party in his ill-gotten gains, the statutes passed upon these subjects would be nugatory, since they could be constantly and easily evaded by substituting a confession of judgment in the place of a note or bond, or other security. When the public policy established by the legislature is so obvious, and is so clearly founded in the principles of justice, and required by the interests of society, it would ill become a court of equity, by narrow and technical constructions, to deprive itself of the power of enforcing it.

These principles are supported by high judicial authority. So far as the question of usury is concerned, the precise point before us appears to have been decided in the court of appeals of Maryland, upon full argument, in the case of *West v. Beanes*, 3 Harr. & Johns., 568; and, also, in *Fanning v. Dunham*, 5 Johns. Ch., 142. It is true that in the last mentioned case a warrant of attorney to confess the judgment was executed at the same time with the bond, and might perhaps be regarded as one of the securities taken by the lender; but the case evidently was not decided merely on that ground, but was likened by the court to the case of a borrower who had voluntarily paid the money and thereby put it out of his power to resist, as defendant, the claim of the creditor.

As regards the money won at play, it is truly said, in 1 Story's Equity, sections 303-4, that there is no difference, in principle, between usurious and gaming contracts in this respect, as the securities in both cases are void at law, and the contracts in each case against its policy.

§ 558. *The omission of the insolvent to defend himself at law does not bar his permanent trustee from seeking relief in equity.*

We concur in these doctrines, and think the omission of Lloyd to defend himself in the action at law is no bar to the relief asked for by the complainant. If the question of usury or not, or of gaming or not, had been made in the suit at law, and decided against Lloyd, undoubtedly the complainant could not be permitted to try the same questions over again in equity, and consequently would not be entitled to the discovery he asks for; but these questions were not raised in that suit, and have not yet been decided in any court. The question before us is, whether it is too late now to raise them, and whether the judgment confessed shuts the door against further inquiry into the consideration of the notes upon which it is admitted to have been entered. We think it does not; and that the principle upon which the court grants relief after the voluntary payment of the money must also entitle the party to relief after a voluntary confession of judgment. In each case the party, by his voluntary act, has deprived himself of the opportunity of defending himself in a court of law.

§ 559. *Maryland laws on usury.*

The act of the general assembly of Maryland, passed at December session, 1845, after these contracts were made, and, indeed, after the bill in this case was filed, cannot, of course, have any influence on this decision. And if it could, it would not materially affect the principles hereinbefore stated; for although this law abrogates the penalties inflicted by the act of 1704, in cases of usury, and permits the party to recover the sum actually loaned, with legal



interest thereon, yet the contract, so far as the usurious interest is concerned, is still made void, and the policy of the former law upon the subject, in that respect, remains unaltered.

§ 560. *A respondent cannot, upon exceptions, object to answering an interrogatory on the ground that the answer might subject him to a penalty, if he has not interposed that objection in his answer.*

It has, moreover, been insisted, in the argument for the defendant, that the complainant is not entitled to the discovery, because the answer may subject the defendant to a penalty or forfeiture. Upon this point it is sufficient to say that the defendant has not objected to answering on this ground, and does not aver, in his answer, that the discovery sought would bring him into any such danger; it cannot, therefore, we think, be relied on in the argument.

§ 561. *The mere making of a usurious agreement does not subject the lender to a penalty.*

But if this defense had been made in the answer, it could hardly have been sustained; for, as relates to the usury, it is admitted by the bill that no money was received by the defendant; and the mere making of a usurious agreement, or taking a bond or other obligation to secure it, does not subject the lender to a penalty or forfeiture.

§ 562. *Merely stating whether the consideration of a note was a gambling debt does not subject the party to a penalty for gaming.*

Nor do we perceive how he will be brought into any such danger by answering that part of the interrogatory which concerns the note alleged to have been given for a gaming debt. If he admits that the note was given for money won at play, it is difficult to imagine how that fact could be used to prove that he kept a faro bank, or practiced any other of those devices upon which the law inflicts a punishment; nor can we imagine how this fact could become a material link in any chain of evidence in a prosecution against him. He is not asked to state the circumstances under which the money was won; he is required simply to say whether the consideration was a gaming debt or not; and there are a multitude of ways in which he may have won the money without subjecting himself to a penalty.

In a defense of this kind the bare statement of the defendant would hardly be sufficient, even if made in his answer; the court must be satisfied that he has some reasonable and probable grounds to apprehend danger from his answer, in case a prosecution should afterwards be instituted against him. The right to a discovery, so far as it can be maintained on principles of equity, would seem to be peculiarly necessary and appropriate in cases of this kind, where the winner most commonly takes the security in private; where no witnesses are present who know anything of the transaction; and does this in order to deprive the loser of proof, if he should afterwards endeavor to resist the payment.

§ 563. *It is no penalty that a party is prevented from recovering a gambling or usurious debt.*

No doubt an affirmative answer in this case will prevent the party from recovering the money; but that is not a penalty or forfeiture within the meaning of the law. The object of every bill of discovery is to obtain from the defendant the admission of some fact which the complainant supposes will enable him to prevent the recovery of some claim which the defendant has made against him, or enable him to enforce a claim against the defendant which he has not otherwise sufficient testimony to establish.

§ 564. *The rights of a permanent trustee under the insolvent law of Maryland.*

It has been further argued that, as Lloyd himself has not made this defense, nor united in this proceeding, his trustee under the insolvent law has no right to bring these claims into question. But we regard it as settled law, that the permanent trustee, appointed upon the release of the insolvent, becomes immediately vested with all the rights, at law or in equity, which the latter then possessed, and may enforce any right, or make any defense, which the insolvent could have maintained or enforced at the time of his insolvency. These rights are transferred to the trustee, and the complainant may now make the same defenses, at law or in equity, against these claims, and against the judgment upon them, which Lloyd could have made if he had never become insolvent.

The first and second exceptions filed by the complainant must therefore be allowed, and the answer of the defendant in those respects adjudged insufficient; and the injunction heretofore granted be continued until the further order of this court. The third exception of the complainant is overruled.

BANK OF THE UNITED STATES v. BANK OF WASHINGTON.

(6 Peters, 8-19. 1832.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up on a writ of error to the circuit court of the United States for the District of Columbia. The judgment in the court below was given upon a statement of facts agreed upon between the parties, substantially as follows:

Triplett and Neale, in April, 1824, recovered a judgment against the Bank of Washington for \$881.18. A writ of error was prosecuted by the Bank of Washington, and that judgment was reversed by this court at the January term, 1828. 1 Pet., 25. But whilst that judgment was in full force, and before the allowance of the writ of error, Triplett and Neale, on the 30th of August, 1824, sued out an execution against the Bank of Washington, and inclosed it to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States at Washington, with the following indorsement:

*"Triplett and Neale v. The Bank of Washington."*

"Use and benefit of the office of discount and deposit, United States, Washington city." Chr. Neale. "Pay to Mr. Brooke Mackall." Rd. Smith, cashier. "Received \$881.18." B. Mackall.

B. Mackall, who was the runner in the branch bank, presented the execution to the Bank of Washington, and received the amount due thereon, on the 9th of September, 1824. At the time of receiving the same, William A. Bradley, cashier of the Bank of Washington, verbally gave notice to said Mackall that it was the intention of the Bank of Washington to appeal to the supreme court, and that the said office of discount and deposit would be expected, in case of reversal of the judgment, to refund the amount. Mackall paid the money over to Smith, who entered it to the credit of Neale, one of the plaintiffs in the execution. Before the execution was sent to Smith, Neale had promised him to appropriate the money expected to be recovered from the Bank of Washington, to reduce certain accommodation discounts which he had running in the office of discount and deposit. Smith, when he received the execution with the indorsement thereon, understood and considered that

it was for collection, and the money, when received by him, was deposited to Neale's credit generally, and he would have sent the money to him at Alexandria, if he had requested him to do so, or would have paid his check for the amount. Immediately on the receipt of the money, Smith wrote to Neale informing him thereof, and asking him for specific directions how to apply it, which letter Neale immediately answered, giving him directions, and the money was applied according to such directions.

Upon this statement of facts, the court below gave judgment for the plaintiffs; to reverse which the present writ of error has been brought.

§ 565. *What is done under an execution, conforming to its precepts, issued upon an erroneous judgment, is valid.*

That the Bank of Washington, on the reversal of the judgment of Triplett and Neale, is entitled to restitution in some form or manner, is not denied. The question is, whether recourse can be had to the Bank of the United States, under the circumstances stated in the case agreed. When the money was paid by the Bank of Washington, the judgment was in full force, and no writ of error allowed, or any measures whatever taken which could operate as a *supersedeas* or stay of the execution. Whatever, therefore, was done under the execution towards enforcing payment of the judgment, was done under authority of law. Had the marshal, instead of the runner of the bank, gone with the execution and received the money or coerced payment, he would have been fully justified by authority of the execution; and no declaration or notice on the part of the Bank of Washington of an intention to appeal to the supreme court would have rendered his proceedings illegal, or made him in any manner responsible to the defendants in the execution. Suppose it had become necessary for the marshal to sell some of the property of the bank to satisfy the execution, the purchaser would have acquired a good title under such sale, although the bank might have forbid the sale, accompanied by a declaration of an intention to bring a writ of error. This could not revoke the authority of the officer, and, while that continued, whatever was done under the execution would be valid. It is a settled rule of law, that upon an erroneous judgment, if there be a regular execution, the party may justify under it until the judgment is reversed; for an erroneous judgment is the act of the court. 1 Stra., 509; 1 Ver., 195. If the marshal might have sold the property of the bank and given a good title to the purchaser, it is difficult to discover any good reason why a payment made by the bank should not be equally valid, as it respects the rights of third persons.

§ 566. — *but if the defendant pays the judgment, and it is afterwards reversed, he may recover the money back.*

In neither case does the party against whom the erroneous judgment has been enforced, lose his remedy against the party to the judgment. On the reversal of the judgment, the law raises an obligation in the party to the record who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salk., 587, 588; Tidd's Prac., 936, 1137, 1138. And no doubt circumstances may exist where an action may be sustained to recover back the money. 6 Cowen, 297.

§ 567. — *but in respect to third persons, what has been done under said judgment, while in force, is binding and final.*

But, as it respects third persons, whatever has been done under the judgment whilst it remained in full force is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed, it would virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties. The writ of error may be so taken out as to operate as a *supersedeas*. Or, if a proper case can be made for the interference of a court of chancery, the execution may be stayed by injunction.

§ 568. — *where such execution was indorsed by the plaintiff "to the use and benefit" of a bank, who collected it with notice to its agent of an intent to appeal and expectation of repayment by it upon reversal, the bank was not liable to repay.*

It has been argued, however, on the part of the defendants in error that the Bank of the United States stands in the character of assignees of the judgment, and is thereby subjected to the same responsibility as the original parties, Triplett and Neale.

Without entering into the inquiry whether this would vary the case as to the responsibility of the plaintiff in error, the evidence does not warrant the conclusion that the Bank of the United States stands in the character of assignees of the judgment. There is neither the form nor the substance of an assignment of the judgment. No reference whatever, either written or verbal, is made to it. The mere indorsement on the execution, "use and benefit of the office of discount and deposit of the United States, Washington city," cannot, in its utmost extent, be considered anything more than an authority to receive the money, and apply it to the use of the party receiving it. It is no more an assignment of the judgment than if the authority had been given by a power of attorney in any other manner, or by an order drawn on the Bank of Washington. The whole course of proceeding by the cashier of the office of discount and deposit shows that he understood the indorsement on the execution merely as an authority to receive the money, subject to the order of Neale, with respect to the disposition to be made of it. He did not deal with it as an assignee, having full power and control over the money, but as an agent, subject to the order of his principal. He passed it to his credit on the proper books of the office, and wrote to him asking specific directions how the money should be applied. He received his directions and applied it accordingly, and all this was done six months before the allowance of the writ of error.

It is said, however, that although Mr. Smith might have considered himself a mere agent to collect the money, the Bank of Washington had no reason so to consider him. There is nothing in the case showing that the Bank of Washington had any information on the subject except what was derived from the indorsement on the execution, and if that did not authorize such conclusion, the plaintiff in error is not to be prejudiced by such misapprehension. It was a construction given to a written instrument, and if that construction has been mistaken by the defendant in error, it is not the fault of the opposite party. But again, it is said the payment of the money was accompanied with

notice of an intention to appeal to the supreme court, and that, in case of reversal, it would be expected that the office of discount and deposit would refund the money.

If the plaintiff in error could be made responsible by any such notice, given even in the most direct and explicit manner, that which was given could not reasonably draw after it any such consequence. It is vague in its terms, and does not assert that the office of discount and deposit would be held responsible to refund the money, but only that it would be expected that it would be done. This is not the language of one who was asserting a legal right, or laying the foundation for a legal remedy. And there is no evidence that even this was communicated to the office.

But the answer to the argument is that no notice whatever could change the rights of the parties, so as to make the Bank of the United States responsible to refund the money. When the money was paid, there was a legal obligation on the part of the Bank of Washington to pay it, and a legal right on the part of Triplett and Neale to demand and receive it, or to enforce payment of it under the execution. And whatever was done under that execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington, so far as the rights of strangers or third persons are concerned. The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity; and if no legal right existed when the money was paid to recover it back, no such right could be created by notice of an intention so to do. Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake.

The judgment must accordingly be reversed; and judgment entered for the defendant in the court below. (a)

§ 569. *In general.*—A judgment or decree will not be set aside or superseded unless it appears that the person asking it will be able thereby to procure the relief sought. *In re Morris*,\* 1 Law Rep., 854.

§ 570. To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them. The party complaining must show that he has more equity than the party in whose favor the law has decided. *Brashear v. West*, 7 Pet., 608.

§ 571. A judgment or decree pronounced by a competent tribunal against a party having notice of the pendency of the suit is to be regarded by every other co-ordinate tribunal, and if the judgment or decree be erroneous the error can be corrected only by a superior appellate tribunal. *Amory v. Amory*,\* 3 Bias., 286.

§ 572. *Fraud.*—A judgment or decree of twenty years' standing may be set aside for fraud, clearly alleged and satisfactorily proved, either by positive or circumstantial testimony. *Lennox v. Notrebe, Hemp.*, 251.

§ 573. A bill in equity will be sustained to set aside a judgment upon a policy of insurance, upon the ground of such newly-discovered evidence of fraud and felony on the part of the original plaintiff, as would, if pleaded, have been a perfect defense to the previous action; especially

(a) *Reversing Bank of Washington v. Bank of United States*,\* 4 Cr. C. C., 86.

if the felony were committed by a British subject in a British vessel, on British waters; for the offense is not, in such case, punishable by the criminal law of this country. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

§ 574. Under the provisions of an act of congress passed May 26, 1824, proceedings were instituted in the superior court of the territory of Arkansas, by which a confirmation was claimed of a grant of land alleged to have been made to the petitioner, Sampeyreac, by the Spanish government, prior to the cession of Louisiana to the United States by the treaty of April 8, 1803. This claim was opposed by the district attorney of the United States; and the court, after hearing evidence, decreed that the petitioner recover the land from the United States. Afterwards, the district attorney of the United States, proceeding on the authority of the act of May 8, 1830, filed a bill of review, founded on the allegation that the original decree was obtained by fraud and surprise, that the documents produced in support of Sampeyreac's claim were forged, and that the witnesses who had been examined to sustain the same were perjured. At a subsequent term Stewart was allowed to become a defendant to the bill of review, and filed an answer in which the fraud and forgery are denied, and in which he asserts that, if the same were committed, he is ignorant thereof, and asserts that he is a *bona fide* purchaser of the land for a valuable consideration from one John J. Bowie, who conveyed to him the claim of Sampeyreac by deed, dated about October 22, 1828. On a final hearing, the court, being satisfied of the forgery, perjury and fraud, reversed the original decree. *Held*, that these proceedings were legal, and were authorized by the act of May 5, 1830. *Sampeyreac v. United States*, 7 Pet., 222.

§ 575. One who had recovered a judgment in the federal court in Mississippi against the administrator of a deceased person was seeking by proceedings in Louisiana to subject to the payment of this judgment lands lying in that state as belonging to the estate of the deceased debtor. It was held that one who claimed these lands under a conveyance from the decedent could not sustain a bill in chancery to set the judgment aside for fraud, since he was not a party to the judgment, and since it was not a lien upon the lands. *Stone v. Towne*,\* 1 Otto, 341.

§ 576. A judgment at law or decree in equity will not be set aside on the ground of fraud, if the complainant had knowledge of the facts constituting the fraud, or in the exercise of due diligence might have made them known to the court pending the original suit, or, by the use of due diligence, have ascertained the facts and pleaded them in the original suit; hence, where a bill seeking to set aside a decree failed to charge that the complainant was ignorant of the facts pending the original suit, and that he was unable after due diligence to ascertain and plead them, the bill was held insufficient. *Pacific Railroad Co. v. Missouri Pacific R'y Co.*,\* 12 Fed. R., 641. Case reversed in 111 U. S., 505.

§ 577. The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. It is essential to relief in such a case that the party seeking it show that by some fraud practiced directly on him he has been prevented from presenting his whole case to the court. *United States v. Throckmorton*, 8 Otto, 61.

§ 578. A court of equity has jurisdiction to set aside a judgment at law for fraud, whether the fraud was in the transaction or the instrument on which the action arose, or in the trial and the manner of obtaining the judgment. *Trefz v. Knickerbocker Life Ins. Co.*, 8 Fed. R., 177.

§ 579. Circuit courts have no jurisdiction to review a judgment of another circuit court or of the supreme court unless (it seems) the judgment was obtained by fraud. *Clark v. Hackett*, 1 Cliff., 269.

§ 580. The proper remedy of a person seeking to set aside a decree for fraud is a bill of review, and on appeal affidavits of the party himself filed on a motion to set aside the decree cannot be considered. *Terry v. Commercial Bank, etc.*, 2 Otto, 454.

§ 581. A judgment or decree may be impeached for fraud in obtaining it either in the courts of the United States or in those of another state. *Amory v. Amory*,\* 18 Int. Rev. Rec., 149.

§ 582. Where, in a direct proceeding to set aside the decree of another court, there are parties before a court other than that in which the decree was rendered, and it is charged that the decree was fraudulent, the court can entertain jurisdiction, and, if the fraud is proved, can prevent all parties who are before it from enforcing the decree, and from obtaining any advantage by virtue of a sale made thereunder. *Sahlgard v. Kennedy*, 1 McC., 291.

§ 583. The frauds for which courts of equity will interfere to set aside or stay the enforcement of a judgment of a court having jurisdiction of the subject-matter and the parties must consist of extrinsic collateral acts not involved in the consideration of the merits. They must

be acts by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdiction of the court has been imposed upon: *United States v. Flint*, 4 Saw., 42.

§ 584. But where fraud is alleged as to the finding of a court or commission it is otherwise. Equity will not reopen a case in which the same matter has been once tried, or so put in issue between the parties that it might have been tried. The judgment rendered in such a case is itself the highest evidence that the alleged fraud did not exist, and estops the parties from asserting the contrary. The judgment has settled the matter otherwise; it is *res judicata*. *Ibid*.

§ 585. Courts of equity have undoubted jurisdiction to entertain bills to set aside judgments at law or decrees in chancery on the ground of fraud, and the rules by which the sufficiency of such bills is to be determined are the same, whether the purpose be to set aside a judgment at law or a decree in chancery. *Pacific Railroad v. Missouri Pacific R'y Co.*, 2 McC., 227.

§ 586. No relief will be granted if complainant, desiring to set aside a decree, had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit. Nor will relief be granted if the complainant might by the use of due diligence have ascertained the facts and pleaded them in the original suit. *Ibid*.

§ 587. A judgment will not be set aside upon an original bill, upon the ground that it was founded upon a fraudulent instrument or perjured evidence, where there were no hindrances besides the negligence of the defendant in presenting the defense in the first suit. *Brooks v. O'Hara*, 2 McC., 644.

§ 588. In seeking redress against a decree obtained by fraud or covin, although relief may sometimes be had by motion in the same court, or by bill in the nature of a bill of review, the proper mode is by original bill, because of the inadequency of the former remedies. *Sahlgard v. Kennedy*, 1 McC., 291.

§ 589. State judgments in federal courts.—The federal courts will not entertain jurisdiction to set aside the judgment of a state court for mere irregularity, or in a case where the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, a bill of review or an appeal. The proceedings in all such cases are to be regarded as supplementary to and connected with the original suit, and must be instituted in the same court which rendered the judgment. The federal court can take jurisdiction to set aside the judgment of a state court only where the bill is in its nature a separate, independent and original suit. *Smith v. Schwed*,\* 9 Fed. R., 483.

§ 590. The courts of the United States will not revise or correct judgments or decrees of state courts where the jurisdiction of those courts appears on the record. *Amory v. Amory*,\* 8 Biss., 266.

§ 591. If a proceeding for the purpose of obtaining relief against a decree of a state court is tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a bill of review, or to an appeal, a federal court cannot entertain jurisdiction of the case. On the other hand, if the proceeding is tantamount to a bill in equity to set aside a decree for fraud, then it constitutes an original and independent proceeding, and is within the cognizance of a federal court. *Sahlgard v. Kennedy*, 1 McC., 291.

§ 592. Enjoining.—A judgment of the circuit court of the United States cannot be enjoined by a state court. *McKim v. Voorhies*, 7 Cr., 279.

§ 593. Courts of equity will not enjoin judgments at law unless the complainant has an equitable defense to the cause of action of which he could not avail himself at law because it did not amount to a legal defense; or where he had a good defense at law of which he was prevented from availing himself by fraud or accident, unmixed with negligence of himself or his agents. *Crim v. Handley*, 4 Otto, 652.

§ 594. Lapse of time.—A district court has no power, after a lapse of three years, to sit as a court of error upon its own decree and reverse it, and set aside a judicial sale thereunder; and this is so of a decree in a confiscation case, even though the reason for the confiscation has been removed by pardon. *United States v. Six Lots of Ground*, 1 Woods, 234.

§ 595. A decree rightfully and deliberately made will not be revoked for trifles after a long acquiescence of interested parties, unless it be clearly shown that justice requires it. *Morris' Estate, Crabbe*, 70.

§ 596. A decree of a court of record is not to be set aside seventeen years after it has been rendered, because it was illegal or erroneous. *United States v. Atherton*, 12 Otto, 372.

§ 597. Satisfied judgment.—When a judgment debtor comes into court asking protection on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant the prayer, upon such conditions as justice demands. *Mechanics' Bank of Alexandria v. Lynn*, 1 Pet., 376.

§ 598. An action of nullity under the laws of Louisiana can only be brought in the court which rendered the judgment or the court to which such judgment is appealed, and if such action seeks to declare the judgment void for formal defects, it cannot be maintained in the circuit court of the United States on removal. *Barrow v. Hunton*, 9 Otto, 80.

§ 599. Relief in equity.—A suit was brought in Illinois upon a judgment rendered in Missouri against one as garnishee in an attachment suit. The defendant asked a continuance to enable him to prove that the attachment was served on him by consent in order to induce the defendant in the attachment suit to pay the debt, and that he was not indebted to such defendant, and that this was admitted by the plaintiff in attachment at the time, who assured him that no injury should result to him. *Held*, that the relief of the defendant, if he had any, was in a court of chancery, and that as these facts could not be proved in defense of the action, the motion for continuance should be denied. *Warburton v. Aken*,\* 1 McL., 460.

§ 600. Default.—A. sued B. and trustees in October, 1842, in *assumpsit*, and B. was, with his consent, defaulted. The cause was then continued for two successive terms, when, no application having been made to take off the default or to stay the proceedings, a final judgment was rendered against B. on May 26, 1843, and execution issued June 22, 1843, and levied on the real estate attached. On January 25, 1843, B. petitioned for the benefit of the bankrupt act, and was declared a bankrupt on March 14, 1843. C. was appointed his assignee on April, 7, 1843, and obtained from the United States district judge a writ of injunction to restrain A. from proceeding in his suit, which was dissolved on application of A. on April 28, 1843. This bill was then brought, praying the court to set aside the judgment, and to order the moneys and property levied upon to be paid over and reconveyed to the assignee. *Held*, that as the default was entered before the bankruptcy of B., and was entered without surprise, mistake or fraud, but with the consent of B., and as no application had ever been made to take it off, there was no good ground to set aside the judgment. *Fiske v. Hunt*, 2 Story, 582.

§ 601. Rights of stockholders.—If the officers of a corporation fraudulently consent to judgment or decree, the stockholders may afterwards file a bill to set it aside, if they do so within a reasonable time after the discovery of the fraud; but where such stockholders have notice of bad faith on the part of the directors, and neglect to intervene, and permit final judgment or decree to be entered and a sale to take place, they cannot, after years have elapsed, be permitted to attack the validity of the proceedings. *Pacific Railroad v. Missouri Pacific R'y Co.*,\* 12 Fed. R., 641. Case reversed in 111 U. S., 505.

§ 602. Compromise and settlement.—In the absence of fraud in obtaining it, a decree carrying out a compromise or settlement cannot be impeached. *Thompson v. Maxwell*, 5 Otte 391.

§ 603. An order admitting an alien to citizenship is a judgment, and is conclusive as to the question of requisite length of residence in the United States. That point being necessarily before the court, and having to be passed upon, the order cannot be impeached on that point. Judgments may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud and collusion or not, or even perjury, which were necessarily before the court and passed upon. *The Acorn*, 2 Abb., 434; *United States v. The Acorn*, 12 Int. Rev. Rec., 113.

§ 604. In admiralty.—Upon a libel of review, a court of admiralty can open for a rehearing a final decree, although one rendered at a former term. *Janvrin v. Smith*, 1 Spr., 13.

§ 605. A decree in admiralty may be enjoined by the same court sitting in admiralty. *Dutcher v. Woodhull*, 7 Ben., 313.

§ 606. Liability of surety.—In an action against a surety on an administrator's bond, by an administrator *de bonis non*, judgment for a large amount was recovered on default, and the surety gave his note for the amount. The surety afterwards, in another state, commenced suit against the principals and the holder of the note, alleging that the former judgment was known to be erroneous, and was entered as a means of bringing his principals to a settlement. In this suit it was found that only a small sum was due from the former administrators, and the collection of the note was enjoined. *Held*, that this decree was conclusive of the liability of the surety, and that the collection of the note, and of a judgment rendered on the note, must be enjoined. *Cage v. Cassidy*, 23 How., 109.

§ 607. Opening executor's account.—In the absence of fraud, a bill in equity will not lie to open an executor's accounts which have been closed by the probate court. *McDermott v. Copeland*, 9 Fed. R., 536.



## IV. ESTOPPEL BY JUDGMENT: RES ADJUDICATA.

**SUMMARY**—*General principles*, §§ 608, 609, 611, 617, 628.—*Judgment on writ inferior to writ of right*, § 610.—*Action upon a different claim*, § 611.—*Different form of action*, §§ 612, 616.—*Failure to produce evidence in former trial*, § 618.—*Must be between the same parties*, § 614.—*Parties and cause of action different*, § 615.—*The determination of a question is conclusive in a suit on a different cause of action*, § 617.—*Concurrent suits in state and federal courts*, § 618.—*Admissibility of extrinsic evidence*, § 619.—*Replevin, and subsequent suit for value of goods*, § 620.—*Suit against one a bar to a suit against two jointly*, § 621.—*Proof under general issue in suit on a note*, § 622.—*Suit on note against a partner a bar to a suit against another partner*, § 623.—*Parties not served*, § 624.—*Courts may limit effect of judgments*, § 625.—*Judgment against one upon a joint contract*, § 626.—*Judgment reversed and cause dismissed*, § 627.—*The question involved must have been passed upon in the former action*, § 628.—*Effect of plea of nul tiel record in suit on alleged former judgment*, § 629.—*Party not estopped to plead limitations*, § 630.—*More than one count in declaration in first suit*, § 631.—*Proof of identity of causes of action*, §§ 632, 633.—*Failure to raise a question in a former suit*, § 634.—*Same parties and same subject-matter*, § 635.—*Suit by apparent owner of bonds; subsequent suit by real owner*, § 636.—*Suit on patent containing two claims*, § 637.—*Subsequent suit for interest due on bonds*, § 638.—*Judgment of dismissal*, § 639.—*Decree presumed to be rendered on the merits*, § 640.—*Affirmance by a divided court*, § 641.—*On confession, verdict or demurrer, a bar*, § 642.—*Nonsuit*, §§ 643, 644, 650.—*Dismissal by agreement*, §§ 645, 646.—*Dismissal at party's cost, omitting "without prejudice"*, § 647.—*Creditor's bill; dismissal and decree for defendant*, § 648.—*Nonsuit on agreed statement*, § 649.—*Failure of plaintiff on demurrer in first suit*, §§ 651-653.

§ 608. The judgment of a court of competent jurisdiction, upon a question directly involved, is conclusive as to that question in another suit between the same parties. *Russell v. Place*, §§ 609-91.

§ 609. The final judgment of a court having jurisdiction of the cause and the parties is, until reversed, binding on every other court. *Derby v. Jacques*, §§ 704-9.

§ 610. Where a state has abolished the writ of right, a final judgment on an inferior writ may be pleaded in bar in the federal court in such state. *Ibid*.

§ 611. It seems that a judgment, if rendered upon the merits, constitutes an absolute bar to any subsequent action between the same parties upon the same cause of action, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim, but also as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. *Cromwell v. County of Sac*, §§ 685-88.

§ 612. Wherever a matter of litigation has been once adjudicated and determined by a competent tribunal, it precludes another action for the same demand, even where a different form of action is resorted to in the second instance. *Ramsey v. Herndon*, §§ 654-55.

§ 613. The defendant was sued on a promissory note, to which he entered a plea of *non-assumpsit*, and also a former judgment in bar, on the same identical promises and undertakings. The replication averred that the promises and undertakings in the plaintiff's declaration alleged were not before the jury as evidence in the former trial. On a demurrer to the replication, the court held that, although the plaintiffs might have a just demand, and were by accident, surprise or mistake unable to have their evidence before the jury in the former action, and so lost their cause, still they could not be relieved in the action at bar without a violation of the long established principles of jurisprudence; and the replication was adjudged insufficient. *Ibid*.

§ 614. Even where a cause of action is the same, if the parties are not the same in each suit, a former judgment is not necessarily a merger of the contract so as to bar the second suit; to operate as a positive bar, it must be a judgment between the same parties. *Lawrence v. Vernon*, §§ 656-59.

§ 615. A., B. and C. brought an action against D. to recover a sum of money paid by them as his proportion of a sum due for the widening of the upper and lower ends of a certain street. The jury found a verdict in their favor, and further that the defendant had promised, so far as to make himself liable for the damages incurred by widening the upper part of said street. Subsequently the present action was brought by A. and B., only, against D., seeking to recover a sum paid by them as his proportion of a sum due for widening the lower part of the same

street. D. introduced the record of the former suit in evidence. It was held that the principle of *res adjudicata* would not apply, the parties and the causes of action being entirely dissimilar. *Ibid.*

§ 616. A former verdict and judgment given upon the same claim, in a personal action, between the same parties, upon the merits, is a good bar to a second action for that claim, even though the form of the action be dissimilar. *Ibid.*

§ 617. The determination of a question directly involved in one action is conclusive of the same question in a second suit between the same parties upon a different cause of action. Thus in a suit to foreclose a mortgage and set aside an alleged pretended assignment of the mortgage to a certain person made a defendant to the action, a former determination of the validity of the assignment of another mortgage assigned at the same time, for the same purpose, to the same person, and in the same words, is conclusive of the question, the former action being to foreclose such other mortgage, and the parties to the two suits being the same. It cannot be objected to such estoppel that the party estopped did not bring forward all the evidence to support his side of the issue in the former controversy. *Flanagin v. Thompson*, § 660.

§ 618. A. and B. began counter actions against each other, A. filing a libel in the federal court, and B. bringing an action for damages in a state court. In each suit each party alleged the other to be in fault in the same identical particulars which he set up in the other suit. B. was the first to recover judgment, after which he made a motion in the federal court for leave to file a supplemental answer setting up his judgment in bar. *Held*, that the judgment of the state court was a bar to further proceedings, and the motion was granted. *The Tubal Cain*. §§ 661-62.

§ 619. Extrinsic evidence is admissible to prove that the real party to a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and this being made to appear, the real party is concluded by the judgment as effectually as if he had been made a party to the record. *Claffin v. Fletcher*, § 663.

§ 620. A. brought an action of replevin in a state court against B., who was the agent of C., for a lot of goods; C. appeared in the case and defended the suit in the name of the agent, and judgment was adverse to A. He then brought suit against C. for the value of the goods. *Held*, that it made no difference that the first suit was for possession of the goods while the present one was for their value. The ownership of the goods was the point in controversy in both suits; hence, the former judgment was conclusive. *Ibid.*

§ 621. Certain public money was deposited in a bank in the joint names of a postmaster and his clerk. The former was removed from office and sued, with his sureties, on his official bond. Judgment was recovered, but owing to insolvency was never satisfied. The present suit was then brought against the clerk and the postmaster jointly. *Held*, that the former judgment was a bar to the present action. *Trafton v. United States*, §§ 664-67.

§ 622. In an action on a note it may be shown under the general issue that the note has been merged in a judgment, for this shows that the cause of action does not exist. *Mason v. Eldred*, §§ 668-75.

§ 623. The liability of partners upon a partnership note is joint and not several, and a judgment against one copartner thereon is a bar to a suit upon the same note against another copartner. (The case of *Sheehy v. Mandeville*, 6 Cr., 254, is by this case overruled.) *Ibid.*

§ 624. Judgments against parties not served with process and who do not appear in the cause have no binding force upon them personally. *Ibid.*

§ 625. It is within the power of a state to limit the operation of judgments as to their effect in merging or extinguishing the original demand. *Ibid.*

§ 626. The common law rule that a judgment against one upon a joint contract of several persons bars an action against the others is changed by the statute of Michigan, declaring that in an action against all of the contractors judgment shall be rendered against all of them, if any are served with process, the same as if all are served, but shall be, as against those not served, evidence only of the extent of the plaintiff's demand, after the defendant's liability shall have been established by other evidence. As against those not served, the judgment is not a bar to a subsequent suit upon the original demand. *Ibid.*

§ 627. A judgment recovered by a plaintiff in a suit in a state court was reversed on appeal, and the cause remanded. But plaintiff had the case dismissed and instituted proceedings in a federal court. *Held*, that the judgment of the state supreme court, reversing the judgment of the court below, was not technically a bar to the present proceeding; but on the same state of facts that judgment was determinative as to the law of the case. The plaintiff, however, was not barred from introducing evidence proving a different state of facts from those that might have been established on the former trial. *Hazard v. Chicago, Burlington & Quincy R. Co.*, §§ 676-77.

§ 628. That a judgment may have the effect of an estoppel it must appear that the matter in question was or might have been directly involved in the former action as a necessary issue,

and was passed upon by the court or jury in the former trial. *Michigan Insurance Bank v. Eldred*, §§ 678-79.

§ 629. In an action brought on a note defendant pleaded a former judgment in bar. In avoidance plaintiff introduced the record of a suit against the defendant on the same judgment, in Wisconsin, wherein the defendant pleaded *nul tiel record*, and a nonsuit was then had. It not appearing that the nonsuit was necessitated by such plea, the court held that there was no error in excluding the record of the Wisconsin trial, and that the action was barred by the previous judgment. *Ibid*.

§ 630. A. sued B. on a promissory note. B., under a clause in the Georgia constitution denying jurisdiction to any court of a debt whereof the consideration was a slave, pleads the illegal consideration, although the debt was incurred prior to the adoption of the constitution. Subsequently, the United States supreme court decided that the clause in the Georgia constitution was of no effect as to any contract made before its adoption. Thereafter A. brought a second suit on the same note, and, upon B.'s pleading the statute of limitations, it was held that he was not estopped from setting up such plea by the fact that he had in the previous suit successfully relied on the illegality of the consideration, which plea had since been decided to be untenable by the supreme court. *Turner v. Edwards*, § 680.

§ 631. In an action upon a contract the plaintiff declared in two counts, and also the common counts, on which a general verdict was rendered in his favor on the entire declaration, but judgment was rendered only on the first count. In a later action based on the same cause, it was insisted that the effect of a verdict and judgment on the whole declaration and a verdict and judgment on the first count was precisely the same in producing an estoppel as respects matters contained in that especial count. *Held*, that where a number of issues are presented, the finding of any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of the issues. *Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, §§ 681-83.

§ 632. A., as the holder of a note, brings an action on it against B., who sets up two defenses, and the jury return a verdict against A. Subsequently C., an indorsee, sues B. on the same note. B. pleads the same two defenses as in the previous action, and in addition sets up the former judgment in bar, the record of the former trial being accompanied by an admission that testimony was offered to sustain both defenses. *Held*, that such evidence *aliunde* having relieved the uncertainty in the record and shown that the questions raised by the pleadings in the second action were identical with those in the first, the estoppel was effectual. *Merchants' International Steamboat Line v. Lyon*, § 683.

§ 633. Evidence *aliunde* is admissible to prove that a particular question was actually controverted and submitted to the jury, in the course of a trial, when such fact does not appear on the face of the record. *Ibid*.

§ 634. The failure of a party to a suit to raise and have determined a question properly involved in that suit furnishes no good basis for subsequent litigation, and the former judgment may be pleaded in bar. *Stockton v. Ford*, § 684.

§ 635. A. sought to foreclose a judicial mortgage against the property of B. by bill in equity. The finding was adverse to A. Afterwards he filed a second bill seeking to charge B.'s property with the same judicial mortgage, and in addition to recover certain attorneys' fees and costs. The same parties and same subject-matter being involved in both, the second suit could not be maintained. *Ibid*.

§ 636. A., as the apparent owner, brought an action on certain matured coupons that had been attached to county bonds, but failing to show that he was a holder for value, although he had acquired them before maturity, the cause was adjudged against him. Afterward B., who was the real owner, and at whose instigation the previous action had been brought, began an action on the bonds and some later maturing coupons. The plea of estoppel by judgment was interposed. *Held*, that the ruling of the lower court, that B. was estopped by the former judgment from showing in the present action that he had acquired said bonds before maturity and for value, was erroneous. *Cromwell v. County of Sac*, §§ 685-88.

§ 637. The declaration in an action at law averred that the plaintiff was the original inventor of a new and useful improvement in the preparation of leather and obtained a patent for the same, without describing with particularity the nature and operation of the invention; and alleged that the defendant had made and used the invention. It appeared from the evidence that the patent itself contained two claims — one for the use of fat liquor in the treatment of leather, and the other for a process of treating bark-tanned sheep skin by means of a certain compound. The verdict and judgment in favor of the plaintiff did not show which claim had been infringed. In a subsequent action for an infringement of the same patent, by the same defendant, it was held that the record in the former case, lacking certainty as to the claim infringed, did not conclude the defendant from contesting the infringement or validity of the patent in that action. *Russell v. Place*, §§ 689-91.

§ 638. In an action against a corporation for instalments of interest due on certain bonds, the defendant pleaded that its agents, in issuing the bonds, had not complied with the requirements of the statute in several particulars, and a verdict was rendered for the defendant. In a subsequent action on later instalments due on the same bonds, the plaintiff proved that, although the original issue was without authority, yet the corporation subsequently ratified its agent's act. Under the pleadings in the prior trial, the same fact might have been proved, and the court held that, in failing to do so, the plaintiff was concluded by the judgment in that action. *Smith v. Town of Ontario*, §§ 692-93.

§ 639. A decree dismissing a bill in a suit before a federal court, being absolute in its terms, is a final determination, and constitutes a bar to further litigation of the same subject between the same parties. *Durant v. Essex Co.*, §§ 694-95.

§ 640. A decree is presumed to be rendered on the merits of the case unless it contains some words of qualification, as "without prejudice," or terms indicating a right to take further legal proceedings on the subject. *Ibid.*

§ 641. The judges of the supreme court, on a writ of error or appeal from the judgment or decree affirmed by the court below, being equally divided in opinion, such judgment of affirmance stands in full force. *Ibid.*

§ 642. A plea of former recovery, whether it be by confession, verdict or demurrer, is a bar to any new action of the same or like nature for the same cause. *Haldeman v. United States*, §§ 696-98.

§ 643. The entry "that the said suit is not prosecuted, and be dismissed," is the record of a nonsuit, though the customary technical language is not used. *Ibid.*

§ 644. Nonsuits taken on payment of costs by the adverse party, in order that the controversy may be arranged out of court, do not preclude the institution and maintenance of subsequent suits in case of failure to settle the matters in dispute. *Ibid.*

§ 645. The phrase "dismissed agreed" does not, *proprio vigore*, import an agreement to terminate a controversy, nor imply an intention to merge the cause of action in the judgment. *Ibid.*

§ 646. The general entry of dismissal of a suit by agreement is evidence of an intention not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon if necessary. If it is otherwise intended there must be a proper statement to that effect to render it available as a bar. *Ibid.*

§ 647. A bill of complaint being dismissed on motion of the complainant at his own cost, and before hearing, the decree rendered thereon cannot be pleaded in bar of another suit instituted for the same cause and between the same parties, even though the words "without prejudice" be omitted from complainant's motion for dismissal. *Badger v. Badger*, §§ 699, 700.

§ 648. A creditor's bill to subject to the payment of the creditor's claim property of the debtor which has been fraudulently transferred to a third person, which bill avers the insolvency of the debtor before and since the transfer; that a suit at law and recovery of a judgment against him would be fruitless because he has no property upon which to levy an execution; that the transfer is fraudulent, and that the plaintiff has a lien or privilege upon the property sought to be reached, sufficiently shows the remedilessness of the plaintiff at law to give a court of equity jurisdiction. And when such a bill is dismissed and a decree entered for the defendant, it is a bar to a subsequent bill for the same purpose, although the first bill does not allege the recovery of a judgment at law and return of *nulla bona*, and the second bill does. *Case v. Beauregard*, §§ 701-3.

§ 649. Judgment of nonsuit upon an agreed statement of facts cannot be pleaded in bar to a new suit, though it was rendered by a court of competent jurisdiction and was between the same parties and on the same subject-matter. *Derby v. Jacques*, §§ 704-9.

§ 650. Judgment on a nonsuit at common law was no bar to a subsequent action between the same parties and for the same cause. *Ibid.*

§ 651. If a plaintiff fails on demurrer in his first action, from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although both actions were instituted to enforce the same right. *Gould v. Evansville & Crawford R. Co.*, § 710.

§ 652. A judgment rendered upon a demurrer to the declaration, or to a material pleading setting forth the facts, is conclusive as to the matters confessed; and facts thus established can never afterward be contested between the same parties or those in privity with them. *Ibid.*

§ 653. If judgment be for a defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds disclosed in the first declaration. *Ibid.*

[NOTES.— See §§ 711-875.]

## RAMSEY v. HERNDON.

(Circuit Court for Indiana: 1 McLean, 450-453. 1889.)

Opinion by HOLMAN, J.

STATEMENT OF FACTS.—This is an action on the case founded on promises. The declaration alleges that the defendant made his certain note in writing, bearing date the 12th day of September, 1833, and thereby promised to pay the plaintiffs, ninety days after date, the sum of \$1,279.77, at the office of the Bank of the United States at Cincinnati, yet he had not paid, etc. The defendant pleads *non-assumpsit*. And also that the plaintiffs heretofore instituted a suit against him in the Tippecanoe circuit court, for not performing the same identical promises and undertakings which are set forth in the declaration in this case; on which an issue of *non-assumpsit* was joined. Which issue was tried by a jury regularly impaneled in said court, and a verdict found for the defendant and a judgment thereon rendered in his favor for costs, etc. That said judgment remains in full force, etc.

The plaintiffs reply to this plea, "that the promises and undertakings in the plaintiffs' declaration were not, nor was any part thereof, before the jury as evidence in the trial of the cause mentioned in the defendant's said plea." To this replication the defendant demurs. The question for our decision is whether, under these circumstances, the plaintiffs are now barred from maintaining this action.

§ 654. *Where there has been a verdict and a judgment thereon, it is a bar to a suit for the same cause of action.*

The general principle of law, *nemo bis vexari pro eadem causa*, seems not to be controverted. That wherever a matter of litigation has been once adjudicated and determined by a competent tribunal, it precludes another action for the same demand. And this principle prevails where a different form of action is resorted to in the second instance; as was the case in *Cutter v. Cox*, 2 Black., 170, and *Kitchen v. Campbell*, 3 Wils., 304. Where the same evidence is required to support both actions, the decision of the one is a bar to the other, although the forms of the actions differ, and one is in tort, and the other in contract.

§ 655. — *a replication that the evidence was wholly insufficient, or that no evidence was offered, will not avoid the bar. Cases cited.*

It seems to be admitted by the plaintiffs, that if their evidence had been before the jury in the former action, the judgment in that action would have been a bar to this. But they contend, inasmuch as they gave no evidence of their demand to the jury in the former action, that they are not now precluded from proving and recovering their demand. We have seen no case that authorizes this conclusion. We are unapprised of the merits of the case farther than appears from the pleadings. But if the plaintiffs have a just demand, and were by accident, surprise or mistake unable to have their evidence before the jury in the former action, and so lost their cause, the case is evidently one of great hardship, but we are not able to discern any way by which they can be relieved in this action without a violation of the long established principles of jurisprudence.

In the case of *Middleton v. Markham*, 2 Stra., 1259, the plaintiff, in executing a writ of inquiry, was unable to prove his demand before the jury, and obtained a verdict for nominal damages only. This inquest, on motion,

was set aside by the court, at the plaintiff's costs, on the ground that if the verdict stood it would bar any future action for the same demand, although no evidence had been given to the jury. The court in that case observe that, if the defendant had pleaded, the plaintiff might have suffered a nonsuit, and so have prevented the passing of a verdict to bar a future action.

And Lord Kenyon, in *Seddon v. Tutop*, 6 D. & E., 607, recognized the doctrine of this case, and held that, if the verdict had stood, it would have barred another action. The recognition of this principle by Lord Kenyon in the case of *Seddon v. Tutop* is the more worthy of notice because that case is introduced to prove a contrary doctrine.

The case was this: The plaintiff's declaration contained two counts, one on a note and the other for goods sold. He had judgment by default, and, on executing his writ of inquiry, he was unable to prove the count for goods sold, and took a verdict for the note only. He afterwards brought another action for the goods sold. The former recovery was pleaded in bar, to which it was replied that the promises were not the same for which the former judgment was rendered. Issue was taken on this replication, and a verdict was given for the plaintiff. On a motion to set aside the verdict, the court held that the plaintiff was entitled to recover. Lord Kenyon, in giving this decision, seems aware that he is approaching dangerous ground. He says: "This is a question of great delicacy. We must take care not to tempt persons to try experiments in one action, and, when they fail, to suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought to show, beyond all controversy, that the second is a different cause of action from the first in which he failed." And in referring to the case of *Middleton v. Markham*, he observes: "That case was extremely different from the present. There the plaintiff had but one demand, and though the jury gave inadequate damages, on account of the plaintiff not being prepared with proof of his whole bill, he would have been bound by that verdict if it had stood."

Looking at those two cases in this point of view, we cannot hold the case of *Seddon v. Tutop* as conflicting with the principle laid down in *Middleton v. Markham*. In the case of *Snider & Van Vechten v. Cray*, 2 John., 227, the plaintiff brought an action of trespass for killing a mare. Defendant pleaded a former recovery. The plaintiff in his replication set forth that in the former action the declaration in the same count alleged a trespass, by the defendant, on one day in injuring one of his horses, and another trespass on a different day in killing another of his horses. On the trial the court would not permit him to give evidence of both trespasses under the same count, and compelled him to elect for which he would proceed. He elected to proceed for the injury done to the horse that survived, and recovered damage, and this action for the one that was killed, for which, under the order of the court, he had given no evidence on the former trial. On demurrer to this replication, the court held that the former recovery was no bar, as that was for a different cause of action from the present. We are not disposed to question the correctness of this decision, but we cannot conceive that it supports the position taken by the plaintiffs in this case, or is any authority for maintaining a second action for the same identical demand which has been once before a jury, and a judgment has passed upon it. Hard as this case may be, we see no ground of relief to the plaintiffs in this action, and feel constrained to adjudge the replication insufficient.

## LAWRENCE v. VERNON.

(Circuit Court for Massachusetts: 3 Summer, 20-26. 1837.)

STATEMENT OF FACTS.—This is an action to recover a sum of money from defendant as his proportion of a sum paid by plaintiffs for widening the *lower* end of Doane street, upon which defendant owned property. At the trial defendant offered the record of a former action, brought by Lawrence, Adams and Lamb against him, in which plaintiffs sought to recover a sum of money alleged to have been paid by them for defendant, as his proportion of a sum due for widening the *upper* and *lower* ends of Doane street. The jury in the first action found for plaintiffs, and in explanation of their verdict further found that defendant promised, so far as to make himself liable for the damages incurred by widening the upper part of Doane street. Defendant claimed this record to be conclusive against the present action, as it negated the claim as to the lower end of Doane street, as the former action was for both the upper and lower parts of Doane street. But the court instructed the jury that the record offered in evidence was no bar to the present action. Defendant then moved for a new trial on the ground of the misdirection of the jury by the court's instructions.

Opinion by STORY, J.

The sole question is whether the judgment in the former action is, under the circumstances, a good bar to the present claim, and ought so to have been ruled at the trial before the jury. It is said, and I believe truly, that substantially the same evidence upon all the points in controversy was laid before the jury at each trial; and that, therefore, it is apparent that the questions were the same in each case; and the former verdict and judgment under such circumstances are a complete bar.

§ 656. *When a verdict and judgment are a bar to another action on the same cause.*

I agree that where a former verdict and judgment have been given upon the same claim, in a personal action between the same parties, upon the merits, it is a good bar to a second action for that claim. And it is by no means necessary that the form of action should be the same in each case, if the merits of the whole claim have been substantially tried in the first action. The case of *Hitchin v. Campbell*, 2 Wm. Black., 778, 827; S. C., 3 Wilson, 304, sufficiently establishes that doctrine, and affords a strong illustration of it. In that case the first action was trover for the conversion of certain goods brought by the plaintiffs, as assignees of a bankrupt, against the defendant, who was sheriff of Surrey, and the second action was for money had and received, the proceeds of the sale of the same goods sold by the same defendant. In the former suit a verdict and judgment were given for the defendant; and the court held that they were a good bar to the present suit. The court said that a party shall not bring the same cause of action twice to a final determination. *Nemo debet bis vexari pro eadem causa.*

§ 657. *What is meant by the same cause of action.*

What is meant by the same cause of action is, where the same evidence will support both actions, although the actions may happen to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar or not to a subsequent action. And the court relied in support of this doctrine upon *Ferrer's Case*, 6 Coke, 7, where it was resolved, "that when one is barred in any action, real or personal, by judgment upon demurrer, confession,

verdict, etc., he is barred as to that or the like action, of the like nature, for the same thing forever;" for *expedit Reipublicæ ut sit finis litium*. The court added: *Nemo debet bis vexari* is the general rule, to which there are some exceptions; as, where a man mistakes his action by suing an administrator, when in truth he is an executor. So, also, there is no question that, if a man mistakes his declaration, and the defendant demurs and has judgment, the plaintiff may set it right in a second action. But the principal consideration is, whether it be precisely the same cause of action in both.

Such is the substance of the doctrine asserted by the court on this point, as it appears in the reports in 2 Wm. Black., 827, and 3 Wilson, 304. I see no reason whatsoever to be dissatisfied with it; but, on the contrary, I fully concur in it. But it is important to consider that both of the actions in that case were between the same identical parties and no others; and that in each the sole question was as to the property in the goods; and in each case, as the property was found to belong to the plaintiff or to the defendant, the verdict must be in his favor. The plaintiff, having elected to proceed in tort, and had a decision against him upon the merits, was not entitled to turn round and retry the same question, and none other, in another action.

But the present case is totally different in character and results. The parties are not the same. The causes of action are not the same. The parties plaintiffs in the former suit were Lawrence, Adams and Lamb; in the present suit, Lawrence and Adams only. In the former suit the promise was alleged to be to three persons; and unless a joint promise was proved to all three, that action was not maintainable; for nothing is better settled than the doctrine that in *assumpsit* on a joint promise to three, a promise to all jointly must be proved. A promise to two or one of the plaintiffs will not maintain the suit. Upon this plain ground a promise, if proved in the former suit, to Lawrence and Adams alone, would not have entitled the plaintiffs in that suit to a verdict. On the contrary the verdict must have been, under such circumstances, for the defendant. Nay, in the former suit the verdict of the jury for the defendant may have proceeded upon the very ground which, in the present action, would entitle the plaintiffs to recover, viz., that the promise as to the lower end of Doane street was to Lawrence and Adams alone, and not to Lawrence, Adams and Lamb. In point of fact, too, it appeared at both trials that the money was paid directly by Lawrence and Adams, and not by Lamb, for the opening of the lower end of Doane street. But I lay no stress on this circumstance. What I do lay stress on is the finding of the jury that there was no promise to the *three* plaintiffs to pay the money for opening the lower end of Doane street. But that is quite consistent with the fact that there was a promise to pay to two of them (the present plaintiffs) that sum. And if that were so, then the very ground upon which the former verdict was found for the defendant furnishes the clearest proof of a right to recover in the present suit; for the merits of the present suit were not and could not, in such a state of facts, be tried in the former. Suppose a demurrer had been filed in the former suit, upon which judgment had passed for the defendants; surely it would not be contended that such a judgment would bar the present suit; that a judgment, in a suit brought by three, could bar a suit brought by two on contract.

I agree, also, that the true test generally, though perhaps not universally, whether the causes of action are the same, is whether the same evidence will support each. Lord Eldon so held in *Martin v. Kennedy*, 2 Bos. & Pull., 71. But, tried by this test, the argument of the learned counsel must fail.



§ 658. *The question is not whether the same evidence was offered in each case, but whether the same evidence would support each case.*

The question is not whether the same evidence was offered or produced in each case, but whether the same evidence would support each case. Now, the evidence necessary to maintain the former case was the proof of a joint promise—a promise by the defendant to pay all three plaintiffs, Lawrence, Adams and Lamb. Evidence of a promise to pay two of them, viz., Lawrence and Adams, would not have sustained that action. Yet that evidence would clearly sustain the present action. So that it is clear that the same evidence would not support both actions. The infirmity of the argument is, that it confounds the evidence offered in an action conducing to establish the facts necessary to support it, with the evidence indispensable to support it in point of law. Evidence may be offered in a cause conducing to prove a promise to three, and yet it may satisfactorily prove only a promise to two. The law in such a case holds that the evidence of a promise to two will not support an action by the three. How, then, can we say that the evidence to maintain both actions, that is, the facts necessary to maintain both actions, are the same?

The case of *Sheehy v. Mandeville*, 6 Cranch, 253, 264, 265, affords no inconsiderable light as to the opinion of the supreme court of the United States upon the effect of a former judgment upon the same cause of action. In that case it seems to have been thought that a former judgment, obtained by the plaintiff against one partner upon a joint contract, was no bar to a subsequent action against both of the partners upon the same contract. And it was decided in the same case, that, at all events, it could not be set up as a bar in a several plea by the partner not sued in the former action. That case is much stronger than the present; for in a suit upon a joint contract against one promisor, the non-joinder of one other promisor is pleadable in abatement only, and not in bar; whereas, if all the proper plaintiffs do not sue, it is a fatal objection upon the trial. This doctrine was a good deal commented on in *Lechmere v. Fletcher*, 1 Crompt. & Mees., 623, where the court thought that, if a contract was joint only, and not joint and several, a former judgment against one of the promisors might be a good bar to a second suit against both promisors; not, indeed, upon principle, but upon the ground of a technical difficulty in making the proper parties, since the defendant in the former suit might plead the former several judgment against himself in bar of the joint action against himself; and if that judgment should be a merger of the contract as to the party against whom the judgment was had, it would be fatal in the second suit, as the plaintiff would have sued more defendants than were liable in that suit. The case of *Robertson v. Smith*, 18 John., 459, is directly in point on this head. The same subject came before the circuit court in *United States v. Cushman*, 2 Sumn., 426, 436, for consideration. I do not dwell upon the reasoning or authorities there stated; but I will add, that, upon further reflection, I adhere to the doctrine there decided. The case of *Robertson v. Smith*, 18 John., 459, is in direct conflict with that of *Sheehy v. Mandeville* on its leading point; though, if I were compelled to decide between them, my judicial opinion would be authoritatively bound up by the latter.

§ 659. *Where the cause of action is the same, but the parties not the same, former judgment no bar.*

But what I cite *Sheehy v. Mandeville* for is, that it shows that, even where

the cause of action is the same, if the parties are not the same in each suit the former judgment is not necessarily a merger of the contract so as to bar the second suit; that, to operate as such a positive bar, it must be a judgment between the same parties. In short, the same evidence will not, or at least may not, support each action. Proof of a several contract will not establish a joint contract; though proof of a joint contract may establish a several liability. So far as the case of *Sheehy v. Mandeville* goes, it is authority against the argument of the defendant in the present case.

Upon the whole, and upon the most mature reflection upon this subject, I am satisfied that the ruling of the court at the trial was correct. My only regret is, that the learned counsel have not an opportunity, from the position of the cause, to take the opinion of the supreme court of the United States upon the point.

*Motion for a new trial overruled.*

FLANAGIN v. THOMPSON.

(Circuit Court for Maryland: 4 Hughes, 421-429. 1881.)

Opinion by MORRIS, J.

STATEMENT OF FACTS.—This bill is filed by Margaretta M. Flanagan, wife of William S. Flanagan, a citizen of Pennsylvania, against Hedge Thompson, a citizen of Maryland, and the Easton National Bank of Maryland.

The bill alleges that the defendant Thompson, in 1867, executed a mortgage of land in Maryland to secure a bond for the payment of \$5,000, which bond and mortgage, by proper assignments, had become the property of the complainant, and that, except the sum of \$1,000, no part of the money intended to be secured had been paid, but that the same was long overdue and the mortgage in default. The bill further alleges that the Easton National Bank of Maryland had possession of the bond and mortgage, and sets up a claim to the same by virtue of a pretended assignment, which the complainant charges is null and void. The bill prays that the pretended assignment to the bank may be annulled and set aside, and that the mortgage land may be sold for the payment of the mortgage debt. The bank, by its answer, asserts the validity of the assignment to it, giving the history of the transaction by which it acquired the mortgage, and also, in an amended answer, pleads in bar of the action that the same matters put in controversy by the bill had been adjudicated by the court of appeal of Maryland in a cause between the same parties. The mortgagor makes no defense. He admits that the mortgage is in default and that the title of the bank is valid.

The facts disclosed are: That Mrs. Flanagan, the complainant, in 1872 was the owner of two mortgages on land in Talbot county, Maryland, viz., the one mentioned in this suit, which may be called the "Thompson" mortgage, and another which may be called the "Johnson" mortgage. Her husband being pressed for money, she, at his request, assigned in blank both of these mortgages and the bonds they were intended to secure, and gave them to him to be disposed of. Failing in an effort to sell them outright, he applied to the Easton National Bank to loan him \$7,000 on them as collateral security. This the bank agreed to do on condition that he should execute a note payable at six months, with two other persons as sureties. He did execute such a note for \$7,000, dated December 16, 1872, at six months, payable at a bank in Philadelphia, and over the complainant's signature on each mortgage was written:

"I hereby assign, transfer and set over the within mortgage and the accompanying bond, with all interest thereon, to the president, directors and company of the Easton National Bank of Maryland, as collateral security for the payment of a note discounted December 16, 1872, in favor of William S. Flanagin, for \$7,000, indorsed by R. D. Johnson and Hedge Thompson."

The mortgage and bonds were then delivered to the bank's attorney, and Flanagin received the proceeds of the discounted note. Before this note became due Flanagin notified the bank that he would not be able to pay it at maturity, and asked for a renewal with the same collaterals and sureties. The bank granted his request and consented to renew, but informed him that as the note had been placed in a Philadelphia bank for collection he must take it up there. This he did, and a few days afterwards went from Philadelphia to Easton, and there received the proceeds of the renewal note. Thereafter renewals were granted to him by the bank, upon his solicitation, every six months until March, 1876, when the note then maturing laid over and remains unpaid.

Of the two mortgages thus assigned to the bank, the Johnson mortgage was a second mortgage, and in 1876 Ridgeway, the holder of the first mortgage, filed his bill on the equity side of the Talbot county court, making Flanagin and his wife, the bank, and other persons having an interest in the land, defendants, and obtained a decree for a sale. A sale was made by a trustee, and after paying the Ridgeway claim there remained a balance in his hands applicable to the payment of the second mortgage. Mrs. Flanagin then claimed that balance, and for the first time disputed the title of the bank, and insisted that, as the mortgages were pledged to secure a particular note of \$7,000 of a certain date, described in the written assignment indorsed on the mortgages, and as that particular note had been paid, the bank could not hold the mortgages as security for notes subsequently discounted, to secure which she had never authorized them to be pledged, nor ratified the pledging of them. She claimed that the balance of the fund after paying the first mortgage should be audited to her, and not to the bank. This claim was resisted by the bank, and the issue was raised by proper exceptions to the accounts of the auditor distributing the fund, and was passed upon by the county court. The court's order is to be found in the record filed in this case, and in this language: "The sole question to be determined in this cause is whether the proceeds of sale applicable to the Flanagin mortgage should be awarded to Mrs. Flanagin, or to the Easton National Bank. I am satisfied from the evidence that William S. Flanagin, on the 16th of December, 1872, with the consent and by the authority of his wife, Mrs. M. M. Flanagin, deposited said mortgage, and accompanying bond, as collateral security for the payment of a note for \$7,000, discounted for him by said bank on that day, and also that the note, in these proceedings mentioned, is a renewal of said note. It is thereupon, this 11th day of March, 1880, ordered," etc.

The order overrules the exceptions of Mrs. Flanagin to the account awarding the fund to the bank, and directs the trustee to pay the bank. From this order Mrs. Flanagin appealed, and the record having been transmitted to the court of appeals of Maryland, and the case having been heard there, the order of the county court was affirmed. The opinion of the court of appeals is in the record, and leaves no room for doubt but that the same question was considered and adjudicated by that learned tribunal. In the opinion of the court it is said: "The question for decision in this case arises upon the auditor's

reports distributing the proceeds of sale of certain real estate, and this contest is over the right to the balance of purchase money in the hands of the trustee after paying first liens. At the hearing all the other objections were waived except the one affecting the right of the Easton bank to claim the fund as against the appellant. The appellant claims as mortgagee of the land. The appellee claims on the ground that appellant's mortgage and the bond which the mortgage secured were assigned to the bank as collateral security for a note of appellant's husband and others, which has not been paid."

After very fully discussing the facts with regard to the renewals of the note, and the law applicable to them, the court holds that the transaction was not a payment of the first note, but was an extension of credit, and simply a renewal of the loan; that the parties never intended to pay the first note, and that it never had been paid.

The court, as a further ground for affirming the judgment below, held that as Mrs. Flanagan had indorsed the bond and mortgage in blank, and given them to her husband to dispose of, she had put it in his power to pledge them for each of the successive renewals; and, as she had actual knowledge that he had obtained the loan from the bank on a pledge of them, and made no objection until the auditor's account was stated, she could not then be heard to object.

The bank now contends that the foregoing judgment is conclusive of the issue raised in the present case. The complainant contends that the subject-matter of the controversy is not the same; that the evidence adduced is not the same; and that, therefore, the doctrine of estoppel by *res adjudicata* cannot apply.

The question of what requisites are essential to render a judgment in one case conclusive in another case has been of late years very frequently before the supreme court. That court uniformly has held that it was sufficient, if, in the first case, the same question or matter in dispute had been necessarily in issue and decided between the same parties. Thus, in *Campbell v. Rankin*, 99 U. S., 263, it is said: "Whatever had been the opinion of other courts, it has been the doctrine of this court in regard to suits on contracts, ever since the case of *Steam-packet Co. v. Sickles*, 24 How., 333 (§§ 681-82, *infra*), and in regard to actions affecting real estate, since *Miles v. Caldwell*, 2 Wall., 35, that whenever the same question has been in issue and tried and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and also that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in *Cromwell v. County of Sac*, 94 U. S., 351 (§§ 685-88, *infra*); *Davis v. Brown*, 94 U. S., 423" (BILLS AND NOTES, §§ 1410-15).

In the present case, while it is true that this suit is instituted to foreclose the Thompson mortgage, and that the previous suit was one to foreclose the Johnson mortgage, and therefore the subject-matter of the suits is different, in neither case has there been any controversy over the validity of the mortgage; the sole controversy has been between Mrs. Flanagan and the bank, and as to whether the bank had a right to retain the mortgages as security for the \$7,000 now due it. The assignments and transactions on which the bank bases its claim have all affected both mortgages precisely alike. If the first note of \$7,000 was in legal effect paid, and if in that case the husband never had authority to pledge the mortgages for the subsequent notes, then the

bank had no claim to retain them, nor to receive any part of the proceeds of the mortgaged land in the first case, and has none in this case. The claim of the bank being founded on precisely the same title in both cases, it is evident that the complainant cannot succeed in this case without impeaching the correctness of the decision of the court of appeals, rendered in a case in which the same parties were litigants over the same question.

§ 660. *If between the same parties the same facts are put in issue in two successive suits, the judgment in the first bars the parties in the second as res judicata or estoppel.*

It is error to suppose that, because the two suits concern different subject-matters, the first cannot be conclusive of the second. On the contrary, the supreme court has repeatedly held that notwithstanding the two suits have proceeded upon different causes of action, if in the first the same matter of fact was put in issue between the same parties, and was a necessary ground of recovery, it is a final adjudication of that fact and is an absolute estoppel in the second suit. Thus, in *Cromwell v. County of Sac*, on page 352 of the opinion of the court, it said: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different cause of action. . . . The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all these cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus in *Outram v. Morewood*, 3 East, 346, the defendants were held estopped from averring title to a mine in an action of trespass for digging out coal from it, because, in a previous action for a similar trespass, they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough in his elaborate opinion said: 'It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them.' And in *Gardner v. Buckbee*, 3 Cow., 120, it was held by the supreme court of New York that a verdict and judgment of the marine court of the city of New York, upon one

of two notes, given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note, between the same parties, in the court of common pleas." See, also, the cases cited by Mr. Justice Clifford in his dissenting opinion, page 365.

In the face of these controlling decisions, it is useless to contend that the determination of a question directly involved in one action is not conclusive of that same question in the second suit between the same parties upon a different cause of action. It is, indeed, a qualification of this doctrine, that if a particular and distinct defense which might have been made in the first case was not made at all, was not put in issue and passed upon, then in another suit between the same parties upon a different cause of action the defendant would not be estopped from raising that new issue. The above cited cases of *Cromwell v. County of Sac*, and *Davis v. Brown*, are conclusive to this effect. In the latter case the defendants, being sued on two of a batch of ten promissory notes, all of which they had indorsed and transferred to the plaintiff at the same time, defended solely upon the ground that their liability as indorsers had not been fixed by due prosecution against the makers of the notes. This defense was not sustained, and judgment went against them. In a subsequent suit by the same plaintiff on others of the notes, the same defendants rested their defense on a written agreement of the plaintiff, made at the time all of the notes were transferred, that they should not be held liable for any of them. This, the supreme court decided, they had a right to do, and on page 428 of the opinion it is said: "Where a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter at issue and determined in the original action, and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence."

But it is plain that no new defense against the claim of the bank has been made, and that no different matter has been put in issue in the present case. The controversy is the same, and the issues are the same. It is, however, urged that the testimony is not the same, and that there is now more evidence for the complainant than in the case which went up to the Maryland court of appeals. Particularly, that there is now evidence tending to show that Mr. Flanagan had no authority from his wife to pledge the mortgages, but only to sell them; and that, although she knew of and ratified his pledging them for the note of December 16, 1872, she did not know of and did not ratify his acts as to any renewals of that note.

The obvious answer to this is: *First*, that as the court of appeals determined that the first note was never paid, and that the collaterals pledged for its payment were still bound for it, the want of authority to pledge for the renewals, or the absence of ratification by the wife in respect to such renewals, are now entirely immaterial matters, and that finding of the court of appeals is conclusive of the complainant's whole case. *Second*, that the question of the husband's authority over the bonds and mortgages, and his right to pledge them for the renewals, was in fact put in issue and was decided by the court of appeals. The husband did testify in that case as to his authority, and the purpose for which the bonds and mortgages were indorsed in blank and given to him, so that it appears that matter was in issue, and from the opinion of the court of appeals it clearly appears the court so considered it and passed upon it.

That Mrs. Flanagan may be now advised that she did not in the first case bring forward all the evidence she had to support her side of that issue, of course, cannot now be heard as an objection to the estoppel, even if it were an issue in any way material after the adjudication of the court of appeals on the first point. *Smith v. Town of Ontario*, 4 Fed. R., 386. (See §§ 692-93, *infra*.) In my judgment the complainant's bill must be dismissed.

## THE TUBAL CAIN.

(District Court for New York: 9 Federal Reporter, 834-838. 1881.)

## Opinion by BROWN, J.

STATEMENT OF FACTS.—A motion is made for leave to file a supplemental answer setting up a judgment recently recovered in a state court, in another action between the same parties. On July 11, 1879, the respondents, who are owners of the brig *Tubal Cain*, chartered her to the libelants for a voyage from Turk's island to New York, to carry a cargo of salt, in bulk, at the price of seven cents per bushel, and the libelants contracted to furnish such cargo with quick dispatch on her readiness to receive it, and to pay at the rate of \$40 per day for any detention of the vessel through their fault. The *Tubal Cain* proceeded to Turk's island pursuant to the terms of the charter-party, and arrived there on September 8, 1879, but no cargo could be at once procured. After waiting until the 16th of September, and failing to obtain any cargo, she returned to New York. Before leaving Turk's island her master was requested to go to Inagua, where it was stated that salt could be procured, but he declined to do so.

On the 16th of October the owners, the respondents, commenced an action in the supreme court of this state to recover \$1,358.84, their damages against the present libelants for an alleged breach of the charter-party, in not furnishing a cargo of salt as agreed. The libelants appeared in that action on October 18th, and upon the same day filed their libel in this court to recover \$1,000 for their damages against these respondents for their alleged breach of the charter-party in not "waiting a reasonable time at Turk's island, or procuring a cargo, or going to Inagua for a cargo, as requested." The respondents in their answer, as a defense in this cause, set up the same breach of the charter-party by the libelants which they alleged in their complaint in the state court, and also pleaded in abatement the pendency of the suit in that court. On December 27, 1879, the libelants, as defendants in the suit in the state court, put in their answer, alleging that the master of the *Tubal Cain*, though requested, "refused to await a reasonable and customary time for the said cargo, or to procure a cargo of salt, or to proceed to Inagua," by which it was alleged that the owners were "guilty of a breach of the terms of the charter-party, and not entitled to the compensation named."

In May, 1881, a trial of the suit in the state court was had before the court and a jury, and a verdict rendered for the owners for \$970.41 damages, for which sum and costs judgment was duly entered in their favor on May 28, 1881. The respondents now ask leave to set up by supplemental answer the recovery of this judgment as a bar to the further prosecution of this action. It is admitted that an appeal from this judgment has been taken, and is still pending. This motion is made upon the call of the cause on the day calendar; and, along with the proposed supplemental answer, a duly authenticated copy of the judgment roll in the other suit is also presented to the court, and a de-

cision requested upon the merits of the proposed plea as a virtual disposition of this case.

§ 661. *Where the defense in a state court is the same as the foundation of an action in the federal court, a judgment in the state court against the party setting up such defense is a bar to a further prosecution of the action in the federal court.*

From the facts above stated it is apparent that the claims of the respective parties upon the pleadings in the two suits are mutually exclusive of each other. The claim of each party in the two actions is based solely upon an alleged entire breach of the charter-party by the other, and an entire failure in its performance. Neither party could be defeated in either action except upon proof of facts showing such a breach of contract on its part as must legally preclude it from any recovery in the other action. The sole ultimate question in each case is, which party was in fault for the vessel's return without a cargo? Thus, although the causes of action in the two suits are different, the fundamental question at issue in both is the same. In each suit each party alleges the other to be in fault in the same identical particulars which he sets up in the other suit; and in each the breach of contract alleged is not a partial breach merely, from which some incidental claim arises, but an entire failure of performance, such as necessarily excludes whichever party is guilty of such a failure from all claim under the contract.

The claim for damages which the libelants present by this suit might have been made in the action in the state court, under sections 500-502 of the New York code, as a "counter-claim" growing out of the same transaction, without any substantial change in the answer which they actually interpose in that action. They did not make any such counter-claim for damages in that action, but they set up, as a defense to the plaintiff's demand, the same identical matters upon which their present case is founded. The issues, therefore, in both actions are substantially the same. The issue has been tried upon the merits in the action in the state court, a verdict rendered thereon in favor of the respondents, and a judgment entered upon the verdict. It is not claimed that that issue, and all the matters involved in it, were not fully and fairly presented and tried in that action. Such a judgment properly pleaded is, by all the authorities, held to be an estoppel against all further controversy in any other action between the same parties upon the same subject-matter, whether the particular cause of action be the same or not.

"A fact which has been directly tried and decided by a court of competent jurisdiction cannot be again contested between the same parties in the same or any other court." *Hopkins v. Lee*, 6 Wheat., 109. Its operation is not as a former judgment recovered upon the same cause of action, for the cause of action is not the same; but as an estoppel of record by an adjudication of the same identical matter once heard and determined between the parties. *Russell v. Place*, 94 U. S., 606 (§§ 689-91, *infra*); *Beloit v. Morgan*, 7 Wall., 619; *Aurora City v. West*, *id.*, 82; *Gardner v. Buckbee*, 3 Cow., 120; *Bouchard v. Dias*, 1 Comst., 71; *Hopkins v. Lee*, 6 Wheat., 109; *Bigelow, Estoppel* (2d ed.), 36, 45; *Flanagin v. Thompson*, 9 Fed. R., 177 (see § 660, *supra*).

This case does not present the question which has given rise to conflicting decisions in the different state courts, viz., whether the same estoppel should be held to apply where the same claim or defense was legally involved in the prior action, and might have been presented, but was not, in fact, presented or considered. In such cases the courts of this state hold that if such matter be



available in the former suit, and the issue by its nature involves the whole transaction, the defeated party is equally bound whether he avails himself of it or not. *Dunham v. Bower*, 77 N. Y., 76; *Schwinger v. Raymond*, 83 N. Y., 192. Other cases hold that where the causes of action are not the same, though growing out of the same transaction, the estoppel applies only to such issues as were actually raised and controverted, or to those ultimate facts upon which the verdict and judgment were predicated; and such has recently been the decision of the United States supreme court. *Cromwell v. County of Sac*, 94 U. S., 351 (§§ 685-88, *infra*); *Davis v. Brown*, 94 U. S., 423 (BILLS AND NOTES, §§ 1410-15); *Smith v. Town of Ontario*, 4 Fed. R., 386 (see §§ 692-93, *infra*); *Flanagin v. Thompson*, 9 Fed. R., 177; *Beseque v. Beyers* (Wis.), Chic. Leg. N., Nov. 5, 1881, p. 60.

But here the substantial issue is the same in both cases. Each party urges the same identical facts in his own favor in both actions,—in the one action as a ground of claim for damages; in the other action as a defense against the claim of the other party. In such cases there is no conflict in the decisions. In the last of the above cases cited by the libelants' counsel the effect of the judgment as an estoppel in such a case is conceded. If the judgment had, therefore, been recovered prior to the filing of the libel and pleaded as a defense, it would, when proved, have been conclusive as an estoppel against the libelants' claim in this case. It does not matter that the former judgment was recovered in a different jurisdiction,—a sister state, or even in a foreign country; and a judgment of a state court is binding upon subsequent proceedings in admiralty in reference to the same subject-matter. *Goodrich v. The City*, 5 Wall., 566; *Taylor v. The Royal Saxon*, 1 Wall. Jr., 333.

In the answer here the plea in abatement of the other suit pending was of no avail, as that suit was in a foreign jurisdiction. *Wadleigh v. Veazie*, 3 Sumn., 165; *Loring v. Marsh.*, 2 Cliff., 322; *Mitchell v. Bunch*, 2 Paige, 606; *Salmon v. Wootton*, 9 Dana, 422. But in such cases whichever first ripens into judgment becomes effective, and may be then allowed to be set up as against the further prosecution of the other action. *Child v. Eureka Co.*, 45 N. H., 547. The proper mode of doing this is by supplemental answer or plea *puis darrein continuance*. Steph. Pl., 611; *Hendricks v. Decker*, 35 Barb. (N. Y.), 298; *Butler v. Suffolk Glass Co.*, 126 Mass., 512; *Drought v. Curtiss*, 8 How. (N. Y.), 56.

As there is no claim that the trial in the state court was not a full and fair trial, leave to file the supplemental answer should be granted, and the judgment roll, when offered in evidence, would be a bar to the further prosecution of the libelants' claim. Even if not pleaded, this judgment, as an adjudication against the libelants upon the same breaches of contract alleged by them in their libel, would be competent, if not conclusive, evidence against them on the trial. *Hopkins v. Lee*, 6 Wheat., 109; *Young v. Rummell*, 2 Hill (N. Y.), 478; *S. C.*, 5 Hill (N. Y.), 61.

§ 662. — *practice in such case.*

As the judgment in the state court may be reversed on the appeal pending, the libel should not be dismissed, but the proceedings stayed until the determination of the appeal.

## CLAFLIN v. FLETCHER.

(Circuit Court for Indiana: 7 Federal Reporter, 851-853. 1881.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—This suit is brought by Claflin & Co. against Stoughton A. Fletcher and Francis Churchman for the value of a lot of dry goods, which one George Hazard, by fraudulently representing that he was solvent when in fact he was insolvent, induced the plaintiffs to sell to him on time. It is averred that Fletcher & Churchman bought the goods at sale on execution against Hazard, after being notified of the latter's fraud, and that the plaintiffs had canceled the sale and demanded possession of the property.

The defendants answer that for some time before their purchase of the goods they had been in the custody of John W. Cottom, Robert S. Foster and Ellis G. Shantlin, as the agents of the defendants; that prior to the marshal's sale the plaintiffs demanded possession of the goods of such agents, who, under instructions from the defendants, refused to surrender the same; that the plaintiffs then commenced an action of replevin in the superior court of Marion county, Indiana, against the agents, Cottom, Foster and Shantlin, for possession of the goods; that the defendants appeared, and in the name of their agents controverted the title of the plaintiffs to the goods; that the right of the plaintiffs to the goods was litigated and a verdict and judgment were rendered for defendants, and that this judgment is in full force and unreversed.

After admitting in their reply that they prosecuted their action in replevin to judgment, the plaintiffs aver that the defendants in this suit were not parties to the suit in the state court; that the suit in the latter court was not tried on its merits; that the right of the plaintiffs to the goods was not determined by that action; and that the plaintiffs failed in the state court because they had not, prior to the beginning of their suit, surrendered or offered to surrender to George Hazard the note that he had given for the goods; for which reason the court instructed the jury to return a verdict for the defendants.

§ 663. *Extrinsic evidence admissible to prove that the real party to the suit was not a party to the record. Such party concluded by the judgment.*

The judgment of the state court is conclusive between the same parties and their privies. The defendants in the first suit were the agents of the defendants in this suit. Through these agents the present defendants resisted Claflin & Co.'s claim of ownership in the state court. Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record. It makes no difference that the first suit was for possession of the goods while the present one is for their value. The ownership of the goods was the controversy in the state court, and we have the same controversy in this court. The same proof that would entitle the plaintiffs to recover here ought to have entitled them to a verdict and judgment in the state court. It may be that the judgment of the state court was erroneous, but it cannot be reviewed in this collateral way. The merits were involved in the first suit, and the judgment in it is as conclusive as if it had been on the merits. The issue in that suit was broad enough to entitle the parties to introduce evidence on the merits, and if the

court misapplied the law to the facts before it, the judgment is nevertheless conclusive, and it must stand until corrected in some appropriate manner.

Demurrer sustained.

TRAFTON *v.* UNITED STATES.

(Circuit Court for Maine: 8 Story, 646-657. 1844.)

**STATEMENT OF FACTS.**—Trafton was postmaster and Bright was his clerk on a salary. The postoffice money was kept in a bank in the names of Trafton and Bright. Trafton was removed from office in 1839, sued with his securities on his official bond, and judgment recovered for \$444.41, interest and costs. The principal and securities proving insolvent, this suit was brought in the district court to hold Bright liable for the same debt. There was judgment for the plaintiffs and writ of error. The district judge charged the jury that if defendants deposited the public money in a bank in their own names, it made the money their own and they were responsible in this action.

Opinion by STORY, J.

It does not appear to me that the objections taken to some portions of the depositions and evidence are well founded; and if they were, the merits of the case before the court do not depend upon them. Two questions are presented by the bill of exceptions: First, whether the former judgment against Trafton and his sureties for this identical money is a bar to the present suit. Secondly, whether the present suit is, upon the other admitted facts, maintainable in point of law against the present defendants, even if the former judgment is no bar.

The first question is not without its difficulties, resulting from the state of the authorities; not one of the cases disposed of, in those authorities, has been in all its circumstances precisely like the one at the bar. I pass over, without observation, the point whether, there being a bond given by Trafton for his official conduct, an action of *assumpsit* would lie against him for the money received by him officially; or in other words, whether, in the case of a contract by a sealed instrument for the payment of the money, an action of *assumpsit* would lie for the same money founded upon a simple contract. That question does not necessarily arise in the present case; and if it did, it would be necessary to compare the decision in *Atty v. Parish*, 1 Bos. & Pull., 104, with what was said by Mr. Justice Bayley, in *Tilson v. Warwick Gaslight Company*, 4 Barn. & Cres., 962, 968, and other later cases. If the bond would *per se* have barred the right of suit in the present case, *a fortiori*, a judgment upon that bond would amount to a bar and extinguishment.

§ 664. *A judgment against both of two joint contractors will bar a suit against either, and a judgment against either will bar an action against both.*

In *Sheehy v. Mandeville*, 5 Cranch, 253, the supreme court of the United States held that a judgment rendered in a suit against one of the makers of a promissory note only (it being a partnership note) was not a bar to a joint suit against both the partners. But then the bar was not set up by the partner who was sued in the former suit, but by the other partner not sued; and as to the latter, the court thought that as he was not a party to the former judgment, it did not bind him, and would not operate as a merger in his favor. On the other hand, in *Ward v. Johnson*, 13 Mass., 148, the original suit was brought against one partner upon a partnership contract, and judgment obtained

against him; and afterwards *assumpsit* was brought against both partners, and each of them pleaded the former judgment in bar; and the court held it a good bar. It is observable that in *Sheehy v. Mandeville* the court did not rely upon the fact that the other partner did not join in the plea of the former judgment. In point of fact he had been discharged as an insolvent debtor, and no further proceedings seem to have been had against him. In *Robertson v. Smith*, 18 John., 489, the supreme court of New York held that a joint judgment against one or more partners on a partnership contract was a bar to another action against other partners not sued, and held the case of *Sheehy v. Mandeville* not to be sound law. In *Letchmere v. Fletcher*, 1 Crompt. & Mees., 623, although the case turned upon some special considerations, the opinion was clearly indicated by Mr. Justice Bayley, in delivering the opinion of the court, that unless a contract was both joint and several, a judgment obtained against both would bar a judgment suit on the same contract against either of them alone; and *e converso*, a judgment against one of the joint contractors would be a bar of a subsequent trial against both. And he relied upon *Higgins' Case*, 6 Co. Rep., 48, as fully bearing out these positions, as by implication it certainly does.

§ 665. *Where a contract is joint and several a judgment against both is not a bar to an action against either, and a several judgment against each is no bar to a suit against both.*

It was in this state of the authorities that I was called upon to review and consider their force and bearing in *The United States v. Cushman*, 2 Sumn., 426, 434-441. The conclusion to which I there arrived was, that where the contract was both joint and several, a judgment against both was no bar to a several action against each of them; and a several judgment against each was no bar to a joint judgment against both. The ground in both cases was the same: that as the parties had expressly made the contract several and joint, the merger of either in a judgment would not be a merger of the other. Since that decision, the question has arisen in England, and been directly decided by the court of exchequer in the case of *King v. Hoar*, 8 Jurist, 1127, December, 1844. There the contract was a joint simple contract; a judgment had been obtained against one of the co-contractors, and then another action was brought against the other co-contractor, who pleaded the former against the other co-contractor; and the question upon a demurrer was whether a judgment recovered against one of two joint contractors without alleging execution or satisfaction was a bar to an action against the other. The court held that it was. Mr. Baron Parke, in delivering the opinion of the court, reviewed all the leading authorities and pronounced what appears to me to be a very sound and satisfactory judgment. It proceeds directly upon the ground that when once judgment is given upon any demand it passes *in rem judicatam*, and it cannot, upon the established principles of law, be sued for in another action. If the demand be founded on a joint contract, it is certainly merged and barred in the judgment as to the first contractor sued; and if so merged and barred it would seem equally barred as to the other, since no joint suit can be maintained thereon; and it would seem to follow that the contract being an entirety, and merged or extinguished by the judgment as to one, might be gone as to the other by operation of law. If the latter were such alone he might, even as a matter of pleading, insist that the contract was joint, and, therefore, both contractors ought to be joined. If sued jointly, there could be no judgment obtained against the parties jointly, because the contract as to

one would be gone by the merger; and the suit must be good and maintainable as to all the defendants or not at all.

On this occasion the learned baron referred to the case of *Sheehy v. Mandeville*, 6 Cranch, 253, and expressing a great respect for the judgment pronounced by Mr. Chief Justice Marshall, said he was not satisfied with the reasoning thereof. I must confess that for years I have entertained great doubts as to the propriety of the same decision; and have thought the distinction taken as long ago as in *Higgins' Case*, 6 Co., 44, 46, between joint contracts and joint and several contracts to be a sound one. If, however, the present case were precisely identical with that of *Sheehy v. Mandeville*, I should deem my judicial opinion bound by it, and should follow it without question. But there is this distinction between the two cases: that there the bar was not set up by the judgment debtor who was sued in the second suit; here he does set it up and rely upon it; and the identity of the contract and demand in both is admitted by the parties. The United States sue for the same debt against both parties, assuming the debt to have been originally and equally due from them as a joint contract. Now, I confess myself to be unable to perceive how Trafton can be sued again upon a contract or debt which has passed *in rem judicatam*; and if he cannot be sued again, the present suit is not maintainable, since, unless a joint judgment can be rendered thereon as upon a subsisting joint contract, the very foundation on which the suit rests is gone. It may be said that Bright was neither a party to the former suit nor a surety, and that the joint contract here sued on is not the same joint contract sued on in the former suit. In one sense that may be true; but then as to Trafton it is precisely one and the same identical debt—and that debt is certainly merged in the judgment against him. If merged as to him, it seems (as has been already suggested) very difficult to see how it can remain against Bright. The case *Ex parte Rowlandson*, 3 P. Will., 405, which seems to have been overlooked in all the cases before cited, contains a doctrine strongly corroborative of what has just been stated. Lord Chancellor Talbot there said, “at law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly; and on the contrary, if he sues them jointly he cannot sue them severally, but the one may be pleaded in abatement of the other.” My judgment upon the whole, upon this point, is, that the present case is not governed by the decision in *Sheehy v. Mandeville*; and therefore, being at liberty to follow the dictates of my opinion, I am prepared to hold the former judgment a bar to the present suit.

But supposing the former judgment not to be a bar, it appears to me that, upon the facts of the case, the present action is not maintainable. It is to be taken into consideration that there is not the slightest evidence in the case of any joint and express promise of Trafton and Bright to pay the money sued for to the government. The promise, if any arises, is by mere implication of law. In the first place, there is no privity whatsoever between the government and Bright. He was a mere assistant of the postmaster, and received the money for him, and deposited it with his consent in their joint names. Bright never undertook with the government for the receipt or safe custody of their money. His contract was merely with Trafton, as his principal. Trafton had the sole control, and management, and right of disposal of all the moneys received and deposited; and Bright was bound to obey his orders as to the disposal of them.

§ 666. *It is not the duty of a postmaster to keep the government money separate from his own.*

In the next place, the argument for the United States must necessarily assume that the moneys daily received as and for postage belonged specifically to the United States, and that the postmaster was bound to keep it specifically and distinctly separated from all his own money, and to deposit it in the name of the United States, or in the name of the proper public officer thereof. Now there is no evidence in the case which establishes any such matter of regulation on the part of the postoffice department, or contemplates its existence. Indeed, the practice in the postoffices is, I conjecture, from convenience, if not necessity, almost universally the other way. The postmaster does not deem the daily sums received by them as postage in coin and bank-bills to belong to the government, as their specific coin and bank-bills; but they treat them as sums to be debited to the postmaster, and carried to the general credit of the government as matters of account, precisely as agents, and consignees, and commission merchants are accustomed to charge themselves with the sums received by them for their principals in the course of sales made or demands collected by them. If a postmaster were, in the course of his employment, to receive by mistake base coin, or forged bank-bills, or if, after having received genuine coin, or genuine bank-bills, they were to be lost or destroyed without any negligence on his part, I do not understand that he would be exonerated from responsibility therefor, unless, indeed, the money should, by the orders of the government, be required to be kept specifically, and apart from all other money, and in a particular place, or deposited in the name of the government in a particular bank. Neither do I understand it to be a wrongful conversion of the moneys of the government, for a postmaster to deposit the moneys, received by him for postage, in his own name in a bank, unless the government should, by some regulation, prohibit it, and require the same to be deposited in its own name. There is nothing in the present record which leads to any such conclusion. And no act of congress has been brought to the notice of the court which imposes any such regulation. In former times, I believe, it was a general practice among the collectors of the customs to make deposits of the public moneys in their own names; but of late years that practice has been in a great measure put an end to, by regulations and orders from the treasury department.

I entirely concur in the opinion of the district judge, that by the deposit of the moneys in a bank or banks, in the name of the defendants, they made these moneys their own. But if made their own by such deposit, it must be because it was a lawful act; for if it was an unlawful act, or conversion of the property of the United States, then the moneys did not become their own, but remained the moneys of the United States, as Bright must be presumed to have known all the facts. My difficulty is, how to come to the conclusion that, if the deposit was a lawful one, any joint contract with the government can be inferred from the mere fact that the deposit was made in their joint names. It may here have been made, and for aught that appears was, in fact, made by the orders and direction of Trafton, for his own personal convenience, and the more ready disbursement of the moneys for purposes either of his own private convenience, or connected with the duties of his office. I am unable, therefore, to concur in the instruction of the learned judge that the deposit of the moneys in the joint names of the defendants made them personally and jointly answerable in the action.

§ 667. *Sub-agents acting ex contractu are responsible only to their immediate employers.*

In the next place, there is a most important fact stated in the case, "That the amount paid out of the said postoffice between the 1st day of April, 1837, and the 30th day of June, 1839 (between which periods the balance due to the government must have accrued), in quarterly balances, and for clerk hire, and other incidental expenses of the office, far exceeded the amount deposited in the banks to the credit of Trafton and Bright during that time. But there was more deposited in the said banks during that time than accrued to the government." Now, upon this uncontradicted statement, the government cannot be entitled to recover the moneys, which were so deposited, as moneys belonging to the United States, unless it is shown by the government that the moneys have been misapplied to other purposes than such payments and expenses as above stated; for Trafton had a perfect right to apply those moneys to reimburse himself for such payments and expenses, or to treat them as his own when he had paid or advanced an equivalent amount for the government. As to the moneys received and not deposited, the case finds this important fact also, that "It was proved that Trafton had the general oversight, superintendence and control of the office, and free access to and disposition of the money collected therein." He, therefore, must, in the absence of all contrary proof, be presumed to have had the sole possession, custody and disposition of all the moneys not so deposited. Bright was merely his assistant, and the receipt of the moneys by him as such assistant was a receipt thereof for Trafton, and not jointly for himself and Trafton. In general, sub-agents, acting *ex contractu*, are responsible only to the immediate agents who employ them, and not to the principal, for there is no privity between them. See Story on Agency, §§ 203, 205, note, 217a, 387. And there is no necessary exception to this rule in the case of public officers, although under particular circumstances an exception may arise. But what I proceed upon is, that there is no proof in the case that Bright ever received or appropriated to the joint use of himself and Trafton any of the moneys not deposited; and it is quite consistent with the whole evidence in the case that there never was any such receipt or appropriation on their joint account. It appears to me, therefore, that the charge of the court puts the case to the jury upon this point as if there were evidence before the jury competent in point of law to enable it to infer that there was such a receipt or appropriation of the moneys upon joint account.

The defendants also asked the court to instruct the jury "that if they were satisfied that the said Trafton used the money so collected in the postoffice on his own account, so that not enough was left to pay the plaintiffs (the United States), the said Bright would not be responsible." Now, I confess myself to be under some embarrassment as to the true nature and interpretation of this instruction. If it meant that, if Trafton had used the money so collected on his own account, and that Bright had not received or appropriated any part of the deficit on joint account, then Bright was not answerable in the action, then it appears to me that it ought to have been given. But if it meant that Bright would not be liable for any part of the deficit, even if he had received or appropriated it on joint account, then it might be a question of more difficulty, and perhaps, stated in so abstract a form without reference to the other facts in the case, it might have been properly referred; which interpretation the learned judge gave it does not appear.

Upon the whole, my opinion is that the judgment ought to be reversed;

first, because the former judgment was a bar to the present suit; and secondly, because, upon the admitted facts of the case, the charge of the court is not maintainable, in point of law, in the abstract form in which it is given.

MASON v. ELDRED.

(6 Wallace, 231-241. 1867.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Wisconsin.

STATEMENT OF FACTS.—A suit was brought in Wisconsin by Mason against A. Eldred, E. Eldred and Balcom, partners, on a partnership note. A. Eldred alone was served with process, and pleaded *non-assumpsit*. The note having been offered in evidence, Eldred put in the record of a judgment in a state court of Michigan, in which, although it appeared that E. Eldred alone was served with process, judgment was rendered against all the defendants. Upon the question whether this record was admissible, the judges were divided in opinion.

Opinion by MR. JUSTICE FIELD.

The counsel of the plaintiff suggests that the question presented by the certificate of the judges of the circuit court is divisible into two parts: 1st. Whether the record of the judgment recovered in Michigan was admissible under the pleadings; and, 2d. Whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment.

§ 668. *Under the general issue in assumpsit it may be proved that the cause of action did not subsist at the beginning of the action.*

If the note in suit was merged in the judgment, then the judgment is a bar to the action and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in *assumpsit*, evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit. *Young v. Black*, 7 Cranch, 565; *Young v. Rummell*, 2 Hill, 480. On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit. The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the joint debtor act of Michigan.

§ 669. *Obligation of copartners on partnership contracts; each liable for entire amount.*

It is true that each copartner is bound for the entire amount due on copartnership contracts, and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their



several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought, were made jointly with another and not with the defendant alone, a plea which would be without meaning if the copartnership contract was the several contract of each copartner.

The language of Lord Mansfield in giving the judgment of the king's bench in *Rice v. Shute*, Burr., 2511, "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a copartnership contract the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several that in a suit against him judgment would pass for the whole demand, if the non-joinder of his copartners was not pleaded in abatement. The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

§ 670. *Case cited and criticised.*

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of *Sheehy v. Mandeville*, decided by this court and reported in 6 Cranch, 254. In that case the plaintiff brought a suit upon a promissory note given by Jameson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jameson alone and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different states. It was elaborately reviewed by the supreme court of New York in the case of *Robertson v. Smith*, 18 Johns., 459, where its reasoning was declared unsatisfactory and a judgment rendered in direct conflict with its adjudication. In the supreme court of Massachusetts a ruling similar to that of *Robinson v. Smith* was made. *Ward v. Johnson*, 13 Mass., 148. In *Wann v. McNulty*, 2 Gilm., 359, the supreme court of Illinois commented upon the case of *Sheehy v. Mandeville*, and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the supreme court of the United States, it was well satisfied that the rule adopted by the several state courts — referring to those of New York, Massachusetts, Maryland and Indiana — was more consistent with the principles of law and was supported by better reasons.

In *Smith v. Black*, 9 Serg. & R., 142, the supreme court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not." In its opinion the court referred to *Sheehy v. Mandeville*, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the supreme court of the United States, was not of binding authority and it was disregarded.

In *King v. Hoar*, 13 Mees. & W., 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other was presented to the court of exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that by the judgment recovered the original demand had passed *in rem judicatam*, and could not be made the subject of another action. In the course of the argument the case of *Sheehy v. Mandeville* was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice Marshall, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice Story, in *Trafton v. The United States*, 3 Story, 651 (§§ 664-67, *supra*), refers to this case in the exchequer and to that of *Sheehy v. Mandeville*, and observes that in the first case the court of exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

§ 671. *At common law a judgment against one upon a joint contract of several persons bars an action against the others, though they were dormant partners.*

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

§ 672. *Statute of Michigan on joint contracts.*

If, therefore, the common law rule were to govern the decision of this case, we should feel obliged, notwithstanding *Sheehy v. Mandeville*, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that state (Compiled Laws of Michigan of 1857, vol. 2, ch. 133, p. 1219), the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly

indebted upon any joint obligation, contract or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

§ 673. *Construction of Michigan statute.*

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded. *D'Arcy v. Ketchum*, 11 How., 165 (§§ 1156-57, *infra*). Nor is the demand against the parties not sued merged in the judgment against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the state to limit the operation of the judgment thus recovered. The state can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

§ 674. *Under the joint debtor act of New York, parties not served with process in the case in which judgment is rendered may be sued upon the original demand.*

A similar statute exists in the state of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterwards before the court, if found within the state, that such parties may be sued upon the original demand.

In *Bonesteel v. Todd*, 9 Mich., 379, an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the joint debtor act of New York, process in that state having been served upon his co-defendant alone. The court below held the judgment to be a bar to the action. On error to the supreme court of the state this ruling was held to be erroneous. After referring to decisions in New York, the court said: "No one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

§ 675. *Case cited.*

In *Oakley v. Aspinwall*, 4 Comst., 513, the court of appeals of New York had occasion to consider the effect of a judgment recovered under the joint debtor act of that state upon the original demand. Mr. Justice Bronson, speaking for the court, says: "It is said that the original demand was merged in and extinguished by the judgment, and, consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the original action. But the joint debtor act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course; it can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action which is, in truth, no cause of action at all, then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that state, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.

## HAZARD v. CHICAGO, BURLINGTON &amp; QUINCY RAILROAD COMPANY.

(Circuit Court for Illinois: 4 Bissell, 453-456. 1865.)

## Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—The question arises in this case upon the pleadings, but the main point has been argued irrespective of the form of the pleadings, and it has been submitted to the court by common consent, with a view of ascertaining our opinion upon what is supposed to be the real controversy in the cause, and therefore the opinion of the court will be given without regard to the particular form of the pleadings, which can be made in conformity with the view of the court, as was the understanding between the parties.

A suit was instituted in a state court by Mr. Hazard, the plaintiff, against the defendant, alleging that while upon a railway train of the defendant, by the carelessness and negligence of its agents he was injured, and for the injury the action was brought. The case was tried in the state circuit court and a verdict and judgment obtained for the plaintiff, and it was then taken to the supreme court of the state, which reversed the judgment of the court below. *Chicago, Burlington & Quincy R. Co. v. Hazard*, 26 Ill., 373. When the case went back to the state circuit court it was dismissed by the plaintiff, and thereupon an action was brought in this court.

§ 676. *Suit in state court; judgment reversed and remanded by state supreme court; dismissal by plaintiff; not a technical bar to suit in federal court.*

The declaration alleges substantially the same cause of action; that is to say, it is apparent that it was for the same damage for which the action was brought in the state court. It states that the injury was in consequence of the negligence of the agents of the defendant. Now, the defense set up here is that this judgment of the state court reversing the judgment of the court below is a bar to this suit, and that it cannot be maintained. We are of the opinion that it is not technically a bar to the maintenance of the suit.

If the suit had gone on in the lower state court, it is clear that the plaintiff would have had a right to proceed with the trial of his cause — to have it submitted to a jury upon the evidence. The defendant could not have relied upon the opinion of the court above unless the evidence in the cause was precisely the same in every substantial particular as it was on the former trial, as shown by the bill of exceptions, and we think that the plaintiff cannot be placed in a worse position here than he would have been in the state court, that he has a right to go on here with his cause and have it tried. But we think that the law as laid down by the supreme court of the state ought to govern in this case although it is tried here, and that if it shall turn out that the facts are substantially the same, in every material respect, as they were in the state court, the defendant would have a right to ask this court to instruct the jury that the law is as laid down by the supreme court of the state. But it is possible the facts may be different. For instance, the main question is as to the negligence of the agents of the defendant. The evidence might be different upon a second trial from what it was on the first trial.

§ 677. — *the plaintiff is not barred from introducing evidence proving a different state of facts.*

We hold that the plaintiff cannot be excluded from introducing other and different facts from those which might have been established on the former trial, and which may give color one way or the other to the question of negligence.

This substantially disposes of the only question that has been argued and submitted to the court, and it expresses the opinion of both judges, and the counsel can adapt the pleadings to the views of the court in relation to the question of law. We understand that, upon the statement of the facts as they exist upon the record, the suit in the supreme court of the state does not constitute a bar technically to the maintenance of this action; for example, if it were alleged in the pleadings that this case was tried, and the whole bill of exceptions, the opinion of the court, and the whole record of the court, set forth in the plea, that does not constitute a bar to the maintenance of the suit, as it would not have constituted technically a bar to the continuation of the suit in the state court; that the plaintiff would have had a right to go on and try his case in the state court; that he has the same right here, but that this court will have to lay down the law as it was laid down by the supreme court of the state, if the facts are the same as they were there. Otherwise the effect would be this: that after a party had chosen his own forum, and the opinion of the court was against him upon the law, he might dismiss his suit and go into another forum and insist upon a different rule of law. We think as between a state court and the United States court that rule ought not to apply, but that after a party has chosen his forum, and the opinion of the court, after a full investigation of the case upon the law and the facts of the case, is given, if he dismisses his suit there and comes into this forum, the law laid down by the highest tribunal of the state must govern him here, unless it is upon a question where this court is not bound by the adjudication of the supreme court of the state.

DAVIS, J., concurring.

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## MICHIGAN INSURANCE BANK v. ELDRED.

(Circuit Court for Wisconsin: 6 Bissell, 370-376; 7 Chicago Legal News, 411. 1875.)

STATEMENT OF FACTS.—Action at law upon a note for \$4,000, given by defendant in June, 1861. To bar a recovery the defendant introduced in evidence the record of a judgment previously obtained upon such note by plaintiff in a Michigan state court, in May, 1862. To avoid this plaintiff introduced in evidence the record of a suit instituted in March, 1863, against the defendant upon this judgment in the United States circuit court of Wisconsin, which showed that defendant had pleaded *nul tiel record* to his action, wherein a nonsuit was entered. Plaintiff now argues that this should estop the defendant from pleading the judgment recovered in the state of Michigan in bar of his action. This record was, however, excluded by the court, which held the Michigan judgment a bar to this suit and rendered judgment for defendant.

Opinion by DYER, J.

I have re-examined the question involved in this cause and the authorities cited by counsel. Upon the single issue presented by the note and the Michigan judgment the defendant would of necessity be entitled to a verdict, as that judgment would bar a recovery of the note. *Eldred v. Michigan Insurance Bank*, 17 Wall., 545.

§ 678. *Estoppel defined. Doctrine of estoppel by judgment.*

Could the plea of *nul tiel record* interposed by the defendant, Anson Eldred, in the suit brought in Wisconsin upon the Michigan judgment, operate as an estoppel so as to preclude him from setting up that judgment in the present action as a bar to the plaintiff's recovery upon the note? An estoppel has been well defined as "an obstruction or bar to one's alleging or denying a fact contrary to his own previous action, allegation or denial, upon the faith of which another has acted."

To give to a judgment the effect of an estoppel, it must appear that the matter in question was or might have been directly involved in the former action as a necessary issue, and was passed upon by the court or jury at the former trial. *Kerr v. Hays*, 35 N. Y., 331. The point or question in controversy must have been determined and adjudicated to make the record of the former proceedings conclusive. Where an action has been dismissed or a judgment given for the defendant upon a preliminary point before reaching the merits, it is no bar to another action. *New England Bank v. Lewis*, 8 Pick., 113; *Hughes v. Blake*, 1 Mason, 515; *McDonald v. Rainor*, 8 Johns., 442. "It is the judgment upon the findings that makes the estoppel. If the judgment be one of nonsuit or in the nature of nonsuit, and the action be dismissed, nothing whatever is adjudged in respect to a subsequent suit. It is no bar to anything." *Sheldon v. Edwards*, 35 N. Y., 279. "The rule that estoppels must be certain to every intent is peculiarly applicable to estoppels by record and judicial proceedings, and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled and is not available either as an estoppel or anything else, but merely evidence of its own existence. . . . When the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined." *Herman on Estoppels*,

sec. 86. A party cannot plead a former judgment as an estoppel to a present action unless the same point is put in issue on the record and directly found by the court or jury. *Eastman v. Cooper*, 15 Pick., 276; *Gilbert v. Thompson*, 9 Cush., 348. "The effect of what occurs in one judicial proceeding upon another is sometimes due to the principles of estoppel *in pais*, rather than by record. A man who obtains or defeats a judgment by pleading or representing an act of adjudication in one aspect is estopped from giving it a different and inconsistent character in another suit founded upon the same subject-matter." *Herman on Estoppels*, sec. 100. But it must appear that the judgment was obtained or defeated because of the pleading interposed or representation made.

An estoppel *in pais* happens when a party makes a statement or admission, either expressly or by implication, with the intention of influencing the conduct of another, and that other acts upon the faith of such statement or admission, and will suffer injury if such party is permitted to deny it. *Norton v. Kearney*, 10 Wis., 443; *Brown v. Bowen*, 30 N. Y., 519. "The doctrine of equitable estoppel is founded upon the principle that a party has by his own voluntary act placed himself in such a situation in regard to some fact that he is precluded from denying it." *Herman on Estoppels*, sec. 328. And it must appear that the declarations or acts claimed to create the estoppel were relied and acted upon by the person in whose favor the estoppel is invoked.

§ 679. *Plea of nul tiel record to a suit on a judgment, and nonsuit, not an estoppel to the pleading of such judgment in bar of a suit on the original cause of action.*

Applying these principles, what is the state of case here presented? Clearly, not an estoppel by judgment, because it does not appear that the judgment of the circuit court in Wisconsin was upon the plea of *nul tiel record*, or resulted from that plea. The form of that judgment is as follows: "This day this cause was called for trial, and came the parties by their counsel, when the plaintiff by its counsel took a nonsuit." Then follows a judgment for costs: Nothing was found or determined by the court, as far as the record shows, upon the plea. It was merely a judgment of voluntary nonsuit. It is true that the plea of *nul tiel record* was the only plea that could have been interposed in that action, except the plea of payment, or satisfaction, or the like! But it does not appear from the record that the act or pleading of the defendant produced the action of the plaintiff in taking a nonsuit. It does not appear that the judgment of nonsuit was necessitated, or that a judgment for the plaintiff was defeated by the plea of *nul tiel record*. There may have been numerous reasons why the nonsuit was taken other than the interposition of this plea. The case of *The Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, 24 How., 333 (§§ 681-82, *infra*), is here in point. It was there held that the record of a former suit between the parties in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, cannot be given in evidence as an estoppel in a second suit founded on the special count; for the verdict may have been rendered on the common counts. Since it does not appear that the plaintiff relied and acted upon the plea which the defendant interposed, I think the case is not within the principles of an estoppel *in pais*. Moreover, whether or not there was a valid record and judgment must have been as well known to the plaintiff in the suit on the Michigan judgment in the circuit court in Wisconsin as to the defendant in that action.

In the cases cited by the learned counsel for plaintiff I think it clearly appears that the action of the courts and of the parties was based upon the pleading which was held to operate as an estoppel. *Kelley v. Eichman*, 3 Whart., 419; *Campbell v. Stephens*, 66 Penn. St., 314; *Presbyterian Congregation v. Williams*, 9 Wend., 148. Especially is this true of *Philadelphia, Wilmington & Baltimore R. Co. v. Howard*, 13 How., 308 (CONTRACTS, §§ 1595-1608), where the plaintiff brought an action of *assumpsit* upon an instrument which the defendant insisted was a sealed instrument, and upon this plea the defendant obtained a judgment to the effect that the action of *assumpsit* would not lie. The plaintiff bringing a second action of covenant, it was held that the defendant was estopped to deny in that action that the instrument was a sealed instrument, because in the first action the claim of the defendant not only induced the plaintiff to bring the second action, but defeated the first by asserting and maintaining the paper in controversy to be the deed of the company. This was clearly a case of estoppel *in pais*.

The case of *Sheppard v. Hamilton*, 29 Barb., 156, was strongly urged by plaintiff's counsel at the trial, and again in argument of this motion. The facts were these: Whittlesey held a note of \$1,000, made by Emery and Peter Thayer. The defendant Hamilton became legally bound to Emery Thayer to pay this note. Subsequently Hamilton negotiated with Whittlesey an extension of time for the payment of the \$1,000, and consummated the same by delivery to Whittlesey of a note for \$1,000, made by himself and J. A. Hamilton to the order of Henry Decker, and indorsed by Decker; and Whittlesey thereupon gave up the Thayer note to the defendant, who delivered it to Thayer. The substituted note not being paid when due, the plaintiff, having become possessed by assignment of all the interest of Whittlesey in both notes, commenced an action on the last note against the makers and indorser. The defendants put in a verified answer, alleging a usurious agreement between Whittlesey and the defendant Hamilton. The plaintiff, on the coming in of this answer, discontinued his action and began another action on the first note. *Held*, that in the action on the first note the defendant should not be permitted to deny that what he alleged under his oath in the previous action was true. Here it seems apparent that, relying upon the allegation of usury made by the defendants in the first action, the plaintiff acted upon it, discontinued and abandoned his action, and brought a new action on the original note to avoid the alleged usury, and solely because of the plea of usury. Here was a clear ground for application of the principle of equitable estoppel. Moreover, in that case the plaintiff was the transferee of Whittlesey. He was not a party to the alleged usurious agreement. The usury sprang from the contract between Whittlesey and Hamilton, and the plaintiff was a stranger to it, and when the defendants pleaded it the plaintiff could rightfully rely upon the plea as cause for withdrawal of his suit. But in the case at bar, the plaintiff and defendant were the identical parties to the record of the Michigan judgment, and the plaintiff must be presumed to have had equal knowledge with the defendant of the validity of that record and judgment. If it appeared here that the plea of *nul tiel record* occasioned and was the cause of the nonsuit taken by the plaintiff in the action on the Michigan judgment, if the record showed that the plaintiff relied and acted upon that plea, the principle would be applicable that "when the ground taken by either party to a suit is prejudicial to the other by cutting him off from a good defense, or precluding a recovery on a



valid cause of action, it will bind the party who adopts it by an equitable estoppel."

In any view I can take of this question, I am unable to reach a different conclusion from that arrived at on the trial. Motion for new trial denied.

TURNER v. EDWARDS.

(Circuit Court for Georgia: 2 Woods, 435-437. 1875.)

Opinion by Woods, J.

STATEMENT OF FACTS.—The case is as follows: The constitution of Georgia of 1868, section 18, paragraph 1, declares that "no court or officer shall have, nor shall the general assembly give, jurisdiction or authority to try or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof." An act of the legislature of Georgia, passed March 16, 1869, declared, section 6: "That all actions upon contracts, express or implied, or upon any debt or liability whatsoever, due the public or a corporation, or a private individual or individuals, which accrued prior to the 1st day of June, 1865, and are not now barred, shall be brought by January 1, 1870, or both the right and the right of action to enforce it shall be forever barred."

On the 26th of March, 1867, the plaintiff sued the defendant in the superior court of Henry county, Georgia, on a promissory note of the defendant, dated April 15, 1861, for \$625. The defendant pleaded that the consideration of the note was the purchase price of a slave, and when the case was put on trial at the October term, 1869, he testified to the truth of his plea. Thereupon the court decided that it was without jurisdiction to proceed further, and the plaintiff dismissed his case. Afterwards at the December term, 1871, the supreme court of the United States, in the case of *White v. Hart*, 13 Wall., 647, decided that the clause in the constitution of Georgia, above quoted, had no effect on a contract made previous to its adoption, even though the consideration of the contract was a slave.

At the time of the dismissal of the suit in the state court, the plaintiff was a citizen of Georgia. In September, 1870, he removed to the state of Texas and became a citizen of that state, and on April 17, 1872, he brought suit against the defendant in this court, on the same note. To this action the defendant pleaded the limitation of the act of March 16, 1869, above mentioned.

§ 680. *A party is not estopped from setting up the statute of limitations by the fact that in a previous suit on the same cause of action he had successfully relied on another defense which the supreme court had afterwards decided to be untenable.*

The plaintiff claimed that, under the circumstances stated, the defendant was estopped from setting up the bar of that statute. The court refused to take this view, and the verdict went for the defendant. Solely upon the ground of the alleged error of the court in so refusing, the plaintiff now moves for a new trial.

We think there is no estoppel here. By setting up the plea of want of jurisdiction in the state court to give judgment on a note, the consideration of which was a slave, the defendant was doing what he had a right to do. That the consideration of the note was a slave was true; in addition to this fact the defendant simply stated in his plea the provision of the constitution of the state, which he conceived deprived the court of jurisdiction to try the case.

There was no fraud in making this plea; and in afterwards setting up the bar of the statute to the suit, on the same note, the defendant was not "alleging or denying a fact contrary to his own previous action, allegation or denial;" nor "saying that to be false which by his means had once been accredited for the truth, and by his representations had led others to act." "The very meaning of estoppel is, when an admission is intended to lead, and does lead, the man with whom the party is dealing into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction." *Herman on Estoppel*, 3, 8.

The conduct of the plaintiff does not bring him within any of the definitions of estoppel. He has only exercised his own legal rights, first, in pleading want of jurisdiction to the action in the state court, and second, in pleading the statute of limitations in this court. The plaintiff has at all times been at liberty to resort to his legal remedies. If he has been misled or injured, it is not by any fraudulent or unconscionable conduct of the defendant, but by the mistake of the state court in sustaining a plea insufficient in law. If the plaintiff was not satisfied with the decision of the state court, he had his remedy, and should have pursued it. The question raised in this case has been substantially decided by the supreme court of this state in the case of *Harris v. Gray*, 49 Ga., 585, and in that opinion we concur. See, also, *Hudson v. Carey*, 11 Serg. & R., 10. Motion overruled.

WASHINGTON, ALEXANDRIA & GEORGETOWN STEAM PACKET COMPANY *v.*  
SICKLES.

(24 How., 333-346. 1860.)

ERROR to the Circuit Court of the District of Columbia.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The defendants in error, as plaintiffs, sued the plaintiffs in error in *assumpsit* in the circuit court upon a special parol contract purporting to have been made in 1844, to the effect that they having a patent for Sickles' cut-off for saving fuel in the working of steam-engines, and the defendants being the owners of a certain steamboat, it was agreed between them that the said patentees should attach to the engine of the defendants one of their machines; and that the defendants should pay for the use thereof three-fourths of the saving of fuel produced thereby, the payments to be made from time to time when demanded. That to ascertain the saving of fuel an experiment should be made in the manner described in the declaration, and that the result should be taken as the rate of saving during the continuance of the contract, which was to be as long as the patent and the steamboat should last. The plaintiffs aver that the experiment had been made and the rate of saving had been duly ascertained; and that the machine had been used in connection with the engine on the said boat until the commencement of the suit.

In the first count of the declaration the plaintiffs further stated that they brought in March, 1846, a suit on this contract in the circuit court for the sum then due, and had obtained a verdict and judgment therefor in the circuit court in 1856, and had thus established conclusively the contract between the parties. These last allegations are not contained in the second count. The defendants pleaded the general issue.

The plaintiffs produced upon the trial, as the only testimony of the contract, the proceedings of the suit mentioned in the declaration, and insisted that these

proceedings operated as an estoppel upon the defendants. These proceedings consisted of a writ, a declaration containing two counts upon the contract, and the common counts, and the plea of the general issue: also a docket entry of a general verdict in favor of the plaintiffs on the entire declaration, and a docket entry of judgment subsequently rendered on the first count—a count similar to the counts in the declaration in the present suit. The defendants objected to these docket entries as evidence of a verdict and judgment; but insisted they were simply memoranda or minutes from which a record of a verdict and judgment were to be made. It appears that in the courts of this District, as in Maryland, the docket stands in the place of, or perhaps is, the record, and receives here all the consideration that is yielded to the formal record in other states. These memorials of their proceedings must be intelligible to the court that preserves them, as their only evidence, and we cannot, therefore, refuse to them faith and credit. *Bateler v. State*, 8 G. & J., 381; *Ruggles v. Alexander*, 2 Rawle, 232. Besides this testimony of the contract, the plaintiffs proved the quantity of the fuel that had been used in the running of the boat, and relied upon the rate as settled to determine their demand, and insisted that the defendants were estopped to prove there was no such contract; or to disprove any one of the averments in the first count of the declaration in the former suit; or to show that no saving of the wood had been effected; or to show that the so-called experiment was not made pursuant to the contract, or was fraudulently made, and was not a true and genuine exponent of the capacity of the said cut-off; or to prove that the said verdict was in fact rendered upon all the testimony and allegations that were submitted to the jury, and was in point of fact rendered, as by the docket entry it purports to have been, upon the issues generally, and not upon the first count specially. The circuit court adopted these conclusions of the plaintiffs, and excluded the testimony offered by the defendants to prove those facts.

§ 681. *The doctrine of res judicata stated.*

The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the canonists. Whether a judgment is to have authority as such in another proceeding depends, *an idem corpus sit; quantitas eadem, idemjuss; et an eadem causa petendi et eadem conditio personarum; quæ nisi omnia concurrent alia res est*; or, as stated by another jurist, *exceptionem rei judicate, obstat quotiens eadem questio inter easdem personas revocatur*. The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants. This court described the rule in *Aspden v. Nixon*, 4 How., 467 (Est. of Dec., §§ 99, 100), in such cases to be, that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, must have been made by a court of competent jurisdiction upon the same subject-matter, between the same parties, for the same purpose. The thing demanded in the present suit is a sum of money, being a part of the consideration or price for the use of a valuable machine for which the plaintiffs had a patent, and is the complement of a whole, of which the sum demanded in the first count of the declaration in the former suit is the other part. The special counts in the declaration of each suit are similar, being framed upon this contract; and a decision in the one suit on those counts in favor of the plaintiffs necessarily included and virtually determined its sufficiency to sustain the title of the plaintiffs on it. It was, therefore, admissible as testimony. This conclusion is

supported by adjudged cases and the authority of writers on the law of evidence. *Gardiner v. Buckbee*, 3 Cow., 120; *Dutton v. Woodman*, 9 Cush., 256; *Bonnier des Preuves*, sec. 766; 8 Dalloz, Jur. Generale, 256, 257, 258. Buller, in his work on *Nisi Prius*, says: "If a verdict be had on the same point and between the same parties, it may be given in evidence, though the trial were not had for the same lands, for the verdict in such a case is very persuading evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the jury. . . . It is not necessary that the verdict should be in relation to the same land; for the verdict is only set up to prove the point in question, and every matter is evidence that amounts to a proof of the point in question." B. N. P., 232. The plaintiffs in error contend that, conceding the record to be admissible as evidence, to render the verdict and judgment in the first suit an estoppel, it must be shown by the *record* that the very point which it is sought to estop the party from contesting was distinctly presented by an issue, and expressly found by the jury, and that no estoppel by verdict and judgment can arise in an action on the case, or an action of *assumpsit*, tried upon the general issue, because in no such action can any precise point be made and presented for trial by a jury; and the cases of *Outram v. Morewood*, 3 East, 346, and *Vooght v. Winch*, 2 B. & Ald., 662, are cited in support of this proposition. And the conclusion would seem to be proper for the attainment of the end, for which authority was allowed to the *res judicata* as testimony. Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation. For this purpose the presumption has been adopted that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth.

This presumption is a guaranty of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judgment shall be preserved by the court which renders it in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of the judge and jury, in common law courts, created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision, and subjecting parties to over-technical rules, prolixity and expense. A system of general pleading has been extensively adopted in this country which rendered the application of the principle contended for by the plaintiffs impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res judicata*. It was consequently decided that it was not necessary as between parties and privies that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that

the particular question was material, and was in fact contested, and that it was referred to the decision of the jury.

In *Young v. Black*, 7 Cranch, 565, this court admitted in evidence a record of a former suit between the parties, in which judgment was rendered for the defendant, supported by parol proof that the cause of action in the two suits was the same. The court say: "The controversy had passed *in rem judicatam*, and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question." The current of American authority runs in the same direction. *Wood v. Jackson*, 8 Wend., 9; *Eastman v. Cooper*, 15 Pick., 276; *Marsh v. Pico*, 4 Rawle, 288; *Greenl. Ev.*, § 531.

§ 682. *Where a case is tried upon one special and several common counts, it is competent for the defendant in a subsequent suit to show by parol what were the matters actually tried in that cause.*

In the case before the court, the verdict was rendered upon two special counts and the general counts in *assumpsit*, but the verdict in the subsequent stage of the proceedings was applied by the court only to the first count. The record produced by the plaintiffs showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial, or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs. But when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it. *Merriam v. Whittemore*, 5 Gray, 316; *Hughes v. Alexander*, 5 Duer, 488. The defendants in error contend that the jury, by their verdict, necessarily found the statements of fact in all the counts of the declaration to be true, and the effect of a verdict and judgment on the whole declaration and a verdict and judgment on the first count is precisely the same in producing an estoppel, as respects the matters contained in that special count. But this is not true. If the verdict had been rendered on the special count in exclusion of the others, the record itself would have shown that the existence and validity of the contract were in question. There would have been no ground for the inquiry whether any other issue was presented to the jury. But where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues. *Henderson v. Kenner*, 1 Rich., 474; *Sawyer v. Woodbury*, 7 Gray, 499. Nor do we think that the subsequent application of the verdict to a single count by the court precludes this inquiry. The authority of the courts to make the application, and the circumstances under which it is allowable, was considered by this court in *Matheson v. Grant*, 2 How., 263. It is done for the purpose of preventing the consequences of a misjoinder of counts in a declaration, or of the union of insufficient counts with others so as to allow a valid judgment on the verdict. It had no reference to the use that might be made of the pro-

ceedings as testimony in another proceeding. In Maryland, the power to amend the record in this form was conferred by the act of 1809. 3 Maxey, Laws, 484. The case is not embraced in the earlier act of 1785 upon this subject. 3 H. & J., 9, 91. It is the opinion of the court that the circuit court erred in holding that the plaintiffs in error were estopped by the proceedings in the former suit from any inquiry in respect to the matters in issue and actually tried in that cause, and its judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

MERCHANTS' INTERNATIONAL STEAMBOAT LINE v. LYON.

(Circuit Court for Minnesota: 12 Federal Reporter, 63-66. 1883.)

STATEMENT OF FACTS.—Action against Lyon as the maker of three notes, payable to Bannatyne, and indorsed by him to plaintiff. A national bank had previously sued on these notes, claiming to be the owner of them, and a judgment was rendered in favor of defendant, and this judgment is pleaded in bar of this action. The defense in the former action was that the notes were given without any consideration, and the same defense is relied on in this suit, as well as that the former judgment was a bar to this action. There was judgment for the defendant and a motion for a new trial.

Opinion by NELSON, J.

The plaintiff asserts that the court erred in laying down the proposition that where two defenses are set up in an answer, and evidence is submitted to a jury upon a trial of the action tending to support both defenses, and a general verdict rendered for defendant, such verdict and judgment is a bar in another action upon the same demand.

§ 683. *Effect of a former general judgment and verdict as an estoppel. Where a former judgment is relied on as a defense to an action, what can and what cannot be proved by evidence aliunde.*

The plaintiff's counsel has cited many cases in his brief to sustain the proposition that the general verdict, and judgment which followed, was not a bar; but an examination of them shows that in nearly all the judgment alone, without explanatory evidence, or any admission as to what the facts litigated were, was offered and claimed to be of itself an estoppel. If the offer of the record in evidence in the former action had not been accompanied by the admission that testimony was submitted to sustain both defenses, or evidence *aliunde* given tending to prove that fact, these authorities might be applicable. In this case the presumption is that the jury passed upon all the issues made in the former action, and that they considered the evidence introduced relative to both defenses, and the record is conclusive.

It is impossible to show *aliunde* that the verdict was found upon one and not both defenses without inquiring into the secret deliberations of the jury, which is not admissible. It is only necessary for the defendant, who relies upon the record in a former action as a bar, to go into evidence *aliunde* to prove such a particular question was actually controverted and submitted to the jury, and that the verdict was such as to show that they passed upon it, when such fact does not appear upon the face of the record. This evidence was supplied by the admission of the plaintiff on the trial, and made the estoppel effectual.

The case of *Russell v. Place*, 94 U. S., 606 (§§ 689-91, *infra*), is cited by the plaintiff's counsel as settling in his favor the legal effect of the record in

the former suit. I do not so understand the opinion. In that case a bill was filed to recover for the infringement of a patent. The complaint sets forth the invention and the issue of the patent, and a recovery of a judgment for damages against the defendants in an action at law for a violation of the patentee's rights, and alleges the infringement of the patent by defendants, and asks for a decree. The answer sets up as a defense the want of novelty in the invention, and admits the recovery by the complainant in the action at law of the judgment set up, but denies that the same issues were involved or tried in that action which are raised here. The action at law was in the usual form of such actions for infringement of secured privileges. The defendants pleaded the general issue, and set up by special notice, under the act of congress, the want of novelty in the invention. The plaintiff obtained a verdict for damages, upon which the judgment mentioned in the bill filed was entered, and which it is claimed estops the defendants from insisting upon the want of novelty in the invention. No extrinsic evidence was offered to show that testimony was submitted to the jury upon the question of the novelty of the invention in the action at law, but the record alone was relied upon, which did not show it as a bar to the defense of want of novelty.

The court announced the rule which had on many previous occasions been followed, to wit: That a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to give this effect to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.

Applying the rule thus announced, it appears that the judgment record in the former action, pleaded as an estoppel in this suit, did not, upon its face, show that the verdict was rendered upon the same issue now tendered; and to make the record operate as an estoppel, evidence *aliunde* was necessary to prove that the precise point involved was submitted to the jury. The admission by counsel, in connection with the offer of the record as evidence, that testimony upon both defenses was admitted and went to the jury, relieves the uncertainty in the record, and shows that the question raised by the pleadings in this suit was litigated and determined in the former action. It is true, the plaintiff in this action was not a party to the former suit, but his privity with the plaintiff in the former action is not doubtful. Both plaintiffs claimed through Bannatyne, the payee and first indorser. Motion for new trial denied.

McCRARY, J., concurs.

#### STOCKTON v. FORD.

(18 Howard, 418-420. 1855.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States for the eastern district of Louisiana. The bill was filed by the plaintiff to charge the plantation and slaves of the defendant with a judicial mortgage, originally obtained by one Prior, against the firm of N. and E. Ford & Co. The plaintiff claims an interest in this mortgage, first, by purchase on execution against Prior; and, second, by a trust created in the

assignment of the same by Prior, under which the defendant derived title to it. The bill sets out the sale of the mortgage and purchase by the plaintiff, and also the assignment of the same by Prior to Jones, and by him to the defendant. The assignment to Jones provided for the payment first of the attorneys' fees and all other costs out of the proceeds of the judgment, and the balance to be applied to the debts of Prior for which Jones was responsible, and the surplus, if any, to the assignor.

The plaintiff prayed that the defendant might be decreed to pay the attorneys' fees and costs on obtaining the judicial mortgage, according to the condition of the assignment; and also any balance that might be found due after satisfying the debts for which Jones was responsible. The defendant, among other defenses, set up a former suit in bar. A previous bill had been filed by the plaintiff against the defendant, seeking to foreclose this judicial mortgage, in which the same title as in this case under the execution and sale against Prior was relied on. And, among other defenses to that suit, the defendant set up the assignment of the mortgage by Prior to Jones previous to the said sale on execution, and by Jones to the defendant.

This right of the plaintiff to the judicial mortgage under the sale on execution, and of the defendant under the assignments, were directly involved in that suit, and presented the principal questions in the case. The validity of the assignments over the claim of the plaintiff was maintained by the judgment of the court below, and which was affirmed on appeal to this court. 11 How., 232. This court, after a full examination of the pleadings and proof, say, "that in any view, therefore, that can be properly taken of the case, the plaintiff has shown no right or interest in the judicial mortgage, which he seeks to enforce against the plantation and slaves in question. The whole interest is in the defendant."

The court also observed, "that the assignment (to Jones) was made upon full consideration, without any concealment, or, for aught that appears, intent to hinder and delay creditors; and was well known to the plaintiff long before he became the purchaser at the sheriff's sale. It passed the legal interest in the judicial mortgage out of Prior, and vested it in Jones, as early as the 12th of March, 1840, and we are wholly unable to perceive any ground of equity in the plaintiff, or of those under whom he holds, for disturbing it through a judgment against the assignor, rendered nearly two years afterwards. The sheriff's sale, therefore, could not operate to pass any interest in it to the plaintiff."

§ 684. *A question properly involved in former suit is adjudicated by judgment in such suit.*

One of the questions now sought to be agitated again is precisely the same as this one in the previous suit; namely, the right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied; namely, the equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole of any partial interest in the mortgage. We are satisfied, therefore, that the former suit constitutes a complete bar to the present.



The court, in the former suit, also expressed the opinion that the plaintiff was not in a situation to maintain his claim of title to the mortgage under the execution and sale against Prior; as it appeared in that case that he was the attorney of Prior in the judicial mortgage, and stood in that relation to Jones at the time of the purchase, and, for aught that appears, had made the purchase without his knowledge or consent; and that, under such circumstances, the purchase would inure to the benefit of the client and those holding under him.

It is due to the plaintiff to say that the evidence in this case, explanatory of the point in the former, shows that he did not stand in the relation of attorney to Jones at the time of the sale; or, at least, had no reason to suppose that he stood in that relation; and that no just ground for censure exists in the transaction against him — the explanatory evidence has fully removed it. We think the decree below is right, and should be affirmed.

CROMWELL v. COUNTY OF SAC.

(4 Otto, 351-371. 1876.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.— This was an action on four bonds of the county of Sac, in the state of Iowa, each for \$1,000, and four coupons for interest, attached to them, each for \$100. The bonds were issued in 1860, and were made payable to bearer in the city of New York in the years 1868, 1869, 1870 and 1871 respectively, with annual interest at the rate of ten per cent. a year.

To defeat this action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith, upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit. The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

§ 685. *Doctrine of estoppel by judgment.*

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at

law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery and defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

§ 686. — *where the second suit is upon a different cause of action.*

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram v. Morewood*, 3 East, 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging out coal from it, because in a previous action for a similar trespass they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." And in the case of *Gardner v. Buckbee*, 3 Cowen, 120, it was held by the supreme court of New York that a verdict and judgment in the marine court of the city of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the court of common pleas. The rule laid down in the celebrated opinion in the case of the *Duchess of Kingston* was cited and followed: "That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court."

These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel. In the case of *Miles v. Caldwell*, reported in the 2d of Wal-

lace, a judgment in ejectment in Missouri, where actions of that kind stand, with respect to the operation of a recovery therein, as a bar or estoppel, in the same position as other actions, was held by this court conclusive in a subsequent suit in equity between the parties respecting the title, upon the question of the satisfaction of the mortgage under which the plaintiff claimed title to the premises in the ejectment, and the question as to the fraudulent character of the mortgage under which the defendant claimed, because these questions had been submitted to the jury in that action and had been passed upon by them. The court held, after full consideration, that in cases of tort, equally as in those arising upon contract, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them; and by inevitable implication also held that in the absence of proof in such cases the verdict and judgment were inconclusive, except as to the particular trespass alleged, whatever possible questions might have been raised and determined.

But it is not necessary to take this doctrine as a matter of inference from these cases. The precise point has been adjudged in numerous instances. It was so adjudged by this court in the case of *The Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, 24 How., 333 (§§ 681-82, *supra*). In that case an action was brought upon a special parol contract for the use of Sickles' cut-off for saving fuel in the working of steam-engines, by which the plaintiffs, who had a patent for the cut-off, were to attach one of their machines to the engine of the defendants' boat, and were to receive for its use three-fourths of the saving of fuel thus produced, the payments to be made from time to time when demanded. To ascertain the saving of fuel an experiment was to be made in a specified manner, and the result taken as the rate of saving during the continuance of the contract. The plaintiffs in their declaration averred that the experiment had been made at the rate of saving ascertained, and that the cut-off had been used on the boat until the commencement of the suit. In a prior action against the same defendant for an instalment due, where the declaration set forth the same contract in two counts, the first of which was similar to the counts in the second action, and also the common counts, the plaintiffs had obtained verdict and judgment; and it was insisted that the defendant was estopped by the verdict and judgment produced from proving that there was no such contract as that declared upon, or that no saving of fuel had been obtained, or that the experiment was not made pursuant to the contract, or that the verdict was rendered upon all the issues, and not upon the first count specially. The circuit court assented to these views, and excluded the testimony offered by the defendants to prove those facts. But this court reversed the decision, and held that the defendants were not thus estopped.

"The record produced by the plaintiffs," said the court, "showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of

the machine at the first trial, or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs; but when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it."

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

Various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding. *Boyleau v. Rutlin*, 2 Exch., 665, 681; *Hughes v. Alexander*, 5 Duer, 493.

The case of *Howlett v. Tarte*, 10 C. B. (N. S.), 813, supports this view. That was an action for rent, under a building agreement. The defendant pleaded a subsequent agreement, changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defense pleaded in the second action. On demurrer, the replication, after full argument, was held bad. In deciding the case, Mr. Justice Willes said: "It is quite right that a defendant should be estopped from setting up in the same action a defense which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action. . . . I think we should do wrong to favor the introduction of this new device into the law." Mr. Justice Byles said: "It is plain that there is no authority for saying that the defendant is precluded from setting up this defense." Mr. Justice Keating said: "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

The language of the vice-chancellor, in the case of *Henderson v. Hender-*

son, 3 Hare, 100, 115, is sometimes cited as expressing a different opinion; but, upon examining the facts of that case, it will appear that the language used in no respect conflicts with the doctrine we have stated. In that case, a bill had been filed in the supreme court of Newfoundland, by the next of kin of an intestate, against A. and others, for an account of an estate and of certain partnership transactions. A decree was rendered against A., upon which the next of kin brought actions in England. A. then filed a bill there against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him, and alleging various errors and irregularities in the proceedings in the supreme court of the island, and praying that the estate of the intestate might be administered, the partnership accounts taken, and the amount of the debt due to him ascertained and paid. A demurrer to the bill was allowed for want of equity, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before that court. It was with reference to the necessity of having the subject of particular litigation, as a whole, at once before the court, and not by piecemeal, that the vice-chancellor said:

"In trying this question, I believe I state the rule of court correctly, that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

There is nothing in this language, applied to the facts of the case, which gives support to the doctrine that, whenever in one action a party might have brought forward a particular ground of recovery or defense, and neglected to do so, he is, in a subsequent suit between the same parties upon a different cause of action, precluded from availing himself of such ground.

§ 687. *Where in an action certain municipal bonds were void as against the corporation issuing them, when in the hands of one who did not acquire them before maturity for value, such judgment does not estop the plaintiff from bringing a subsequent action upon other coupons or bonds of the same series, and showing in such subsequent action that he acquired the latter before maturity, in good faith and for value.*

If, now, we consider the main question presented for our determination by the light of the views thus expressed and the authorities cited, its solution will not be difficult. It appears from the findings in the original action of Smith, that the county of Sac, by a vote of its people, authorized the issue of bonds to the amount of \$10,000, for the erection of a court-house; that bonds to that amount were issued by the county judge and delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately upon receipt of the bonds the contractor gave one of them as a gratuity to the county judge; and that the court-house was never constructed by

the contractor, or by any other person pursuant to the contract. It also appears that the plaintiff had become, before their maturity, the holder of twenty-five coupons which had been attached to the bonds, but there was no finding that he had ever given any value for them. The court below held, upon these findings, that the bonds were void as against the county, and gave judgment accordingly. The case coming here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds to call upon the holder to show that he had given value for the coupons; and, not having done so, the judgment was affirmed. Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds, as against the county, must be held to estop the plaintiff here from averring to the contrary. But as the bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a *bona fide* holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had.

Upon the second question presented, we think the court below ruled correctly. Evidence showing that the action of Smith was brought for the sole use and benefit of the present plaintiff was, in our judgment, admissible. The finding that Smith was the holder and owner of the coupons in suit went only to this extent, that he held the legal title to them, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another. Judgment reversed, and cause remanded for a new trial.

Dissenting opinion by MR. JUSTICE CLIFFORD.

Ten bonds, each for the sum of \$1,000, were issued by the county for the purpose of erecting a court-house in the county seat of the county; and it appears that the bonds were made payable to bearer, one each succeeding year, till the whole were paid, with interest at the rate of ten per cent. per annum. Four of the bonds are the subject of the present controversy, and the defense is the estoppel of a prior judgment in favor of the county in a suit brought to collect certain of the interest warrants annexed to the bonds.

Sufficient appears to show that the bonds were in due form, and that they contain the recital that they "were issued by the county, in accordance with the vote of the legal voters thereof, at a special election holden on the day therein mentioned, pursuant to a proclamation made by the county judge, according to the statute of the state in such case made and provided."

Annexed to the bonds were the coupons for the payment of the annual interest, and the plaintiff in the prior suit, being the holder of twenty-five of the coupons, instituted the suit to recover the amount, and he alleged in his declaration that he was the holder and owner of the same; that he received the coupons in good faith before their maturity, and that he paid value for the same at the time of the transfer; that the bonds and coupons were issued by the county under and by virtue of a legal and competent authority, and that the same are valid and legal claims against the corporation. Most of the allegations of the declaration were denied in the answer; but the defendants did not specifically deny that the plaintiff paid value for the coupons at the time he became the holder and owner.

Special findings of the facts were made by the court, from which it appears that the questions whether a court-house should be built, and whether a tax sufficient to liquidate the expense should be levied, were duly submitted to the voters of the county; that the propositions were adopted at a special election held for that purpose; that the county judge made the contract for the erection of the court-house; and that he duly executed the ten bonds in question, and delivered the same to the contractor, in pursuance of the contract.

Proof of a satisfactory character was exhibited that the contract between the judge and the contractor was made in the county where the judge resided; but the court found that the bonds were signed, sealed and delivered by the judge during his temporary absence in another county; and the findings show that the plaintiff became the owner and holder of the coupons before maturity and after the proceedings were correctly entered in the minute-book; nor is it found that the plaintiff had any notice whatever of the supposed irregularities.

Evidence of fraud in the inception of the contract is entirely wanting, except what may be inferred from the unexplained fact that the contractor gave one of the bonds, as a gratuity, to the county judge as soon as he delivered the same to the contractor. Beyond all doubt, the contractor proved to be unworthy, as he never performed his contract or paid back the consideration.

Judgment was rendered for the defendants in the court below; and the majority of this court affirmed the judgment, holding that the evidence showed that the bonds were fraudulent in their inception, and that the plaintiff could not recover, inasmuch as he did not prove affirmatively that he paid value for the bonds.

Authorities are not necessary to show that the transferee of a negotiable instrument made payable to bearer, subsequent to its date, holds it clothed with the presumption that it was negotiated to him at the time of its execution, in the usual course of business and for value, and without notice of any equities between the prior parties to the instrument. *Goodman v. Harvey*, 4 A. & E., 870; *Goodman v. Simonds*, 20 How., 365 (BILLS AND NOTES, §§ 420-25); *Noxon v. De Wolf*, 10 Gray, 346; *Ranger v. Cary*, 1 Met., 373.

Coupons are written contracts for the payment of a definite sum of money on a given day, and, being drawn and executed in a given mode, for the very purpose that they may be separated from the bonds, it is held that they are

negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached. *Knox County v. Aspinwall*, 21 How., 544 (BONDS, §§ 1413-18); *White v. Railroad*, 21 id., 575; *Aurora v. West*, 7 Wall., 105; *Murray v. Lardner*, 2 id., 121 (BONDS, §§ 1340-42).

Possession of the instrument is plenary evidence of title until other evidence is produced to control it, the holder being entitled to the same privileges and immunities as an indorsee of a bill of exchange or promissory note payable to bearer or indorsed in blank. He is not subject to any equities as between the promisor and original payee, nor to the set-off of any debt, legal or equitable, which the latter may owe to the former. *Pettee v. Prout*, 3 Gray, 503.

Title and possession are one and inseparable to clothe the instrument with the *prima facie* presumption that it was indorsed at the date of its execution, and that the holder paid value for it, and received it in good faith in the usual course of business, without notice of any prior equities. Evidence to show that he paid value for the instrument is unnecessary in the opening of his case; but the defendant may, if he can, give evidence that the consideration was illegal, that the instrument was fraudulent in its inception, or that it had been lost or stolen before it was negotiated to the plaintiff; and, if the defendant proves such a defense, it will follow that it must prevail, unless the plaintiff proves that he gave value for the instrument in the usual course of business, in which event he is still entitled to recover. *Fitch v. Jones*, 5 El. & Bl., 238; *Smith v. Braine*, 16 Q. B., 243; *Hall v. Featherstone*, 3 Hurls. & Nor., 237.

Applying that rule to the case as it was first presented, it would seem that the plaintiff should have prevailed, as it is clear that the defendant did not give any sufficient evidence to show that the consideration of the instruments was illegal, or that they were fraudulent in their inception, or that they had been lost or stolen before the plaintiff became the holder of the same, without notice of any prior equities. Suffice it to remark, in this connection, that these views were urged against the former judgment; but they did not prevail, and the judgment was rendered for the defendant, which is unreversed and in full force. Suit is now brought upon the bonds to which those coupons were attached, and the sole question of any importance is whether the judgment in the former case is a bar to the present suit.

Nothing can be more certain in legal decision than the proposition that the title to the bonds and coupons are the same, as the coupons were annexed to the bonds when the bonds were executed and delivered to the original holder, in pursuance of the contract for building the court-house; and it is equally certain that if it could be proved in defense that the consideration was illegal, or that the instruments were fraudulent in their inception, or that they had been lost or stolen before they were negotiated to the holder, the defense would apply to the bonds as well as the coupons.

Before proceeding to examine the legal question, it should be remarked that the former suit was prosecuted in the name of a different plaintiff; but the theory of the present defendants is that the present plaintiff was the real owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit. Testimony to prove that theory was offered in the court below, and the majority of the court now hold that evidence to prove that proposition was properly admitted. Assume that to be so, and it follows that the parties, in legal contemplation, are the same; nor can it be denied that the cause of action, within the meaning of that requirement, as expounded



and defined by decided cases of the highest authority, is the same as that in the former action, the rule being that the legal effect of the former judgment as a bar is not impaired, because the subject-matter of the second suit is different, provided the second suit involves the same title and depends upon the same question. *Outram v. Morewood*, 3 East, 346.

§ 688. *A judgment may be a bar to a subsequent action between the same parties, if the same title is involved, even though the cause of action be founded on a different instrument, or for a different trespass upon the same premises.*

Holders of negotiable securities, as well as every other plaintiff litigant, are entitled to a full trial upon the merits of the cause of action; but if in such a trial judgment be rendered for the defendant, whether it be upon the verdict of a jury or upon a demurrer to a sufficient declaration, or to a material pleading involving the whole merits, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause, upon the same grounds as those disclosed in the first declaration, for the reason that the judgment, under such circumstances, determines the merits of the controversy, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. *Rex v. Kingston*, 20 State Trials, 588; *Kitchen v. Campbell*, 2 W. Bl., 831; *Clearwater v. Meredith*, 1 Wall., 43; *Ricardo v. Garcias*, 12 Cl. & Fin., 400.

Allegations of an essential character may be omitted in the first declaration and be supplied in the second, in which event the judgment on demurrer in the first suit is not a bar to the second, for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action. *Gilman v. Rives*, 10 Pet., 298; *Richardson v. Barton*, 24 How., 188; *Aurora City v. West*, 7 Wall., 90.

Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue, the rule in such a case being that where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and that the whole defense might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties. *Outram v. Morewood*, 3 East, 358; *Greathead v. Broomley*, 7 Term, 452.

Except in special cases the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor, Ev., sec. 1513.

Other text-writers of high authority substantially concur in that view; as, for example, Mr. Greenleaf says that "the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the trial;" and the reason given for that limitation is worthy of notice, which is, that the evidence must correspond with the allegations, and be confined to the point in issue; and he remarks that it is only to the material allegations of one party that the other can be called to answer, for to such alone can testimony be regularly adduced, and upon such an issue only is judgment to be rendered. Pursuant to those suggestions he states his conclusion as follows: "A record, therefore, is not held conclusive as to the

truth of any allegations which were not material nor traversable, but as to things material and traversable it is conclusive and final."

Unless the court in rendering the former judgment was called upon to determine the merits, the judgment is never a complete bar, and it is safe to add that if the trial went off on a technical defect, or because the debt was not yet due, or because the court had not jurisdiction, or because of a temporary disability of the plaintiff, or the like, the judgment will be no bar to a future action. 1 Greenl. Ev., sec. 330.

Since the resolution in Ferrer's Case, 6 Coke, 7, the general principle has always been conceded, that when one is barred in any action, real or personal, by judgment or demurrer, confession or verdict, he is barred to that or a similar action of the like nature for the same thing forever. Demurrer for want of equity in such a case is allowed in chancery because the whole matter in controversy is open in the first suit.

Contrary to that rule a party brought a second bill of complaint, and the vice-chancellor in disposing of the case expressed himself as follows:

"Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because the party has, from negligence, omitted part of his case."

And he added that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Henderson v. Henderson*, 3 Hare, Ch., 115; *Bagot v. Williams*, 3 B. & C., 241; *Roberts v. Heine*, 27 Ala., 678; *Safford v. Clark*, 2 Bing., 382; *Miller v. Covert*, 1 Wend., 487.

When a fact has been once determined in the course of a judicial proceeding, say the supreme court of Massachusetts, and final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done; and they proceed to say that the estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps, or the groundwork upon which it must have been founded. *Burlen v. Shannon*, 99 Mass., 203; *Queen v. Hartington*, 4 El. & Bl., 79†; *Gilbert v. Thompson*, 9 Cush., 349.

Extended explanations upon the subject of estoppel by a prior judgment were made by this court nearly twenty years ago by a judge very competent to perform that duty. *Steam Packet Co. v. Sickles*, 24 How., 342 (§§ 681-82, *supra*). Such a judgment, he said, in order that it may operate as an estoppel, must have been made by a court of competent jurisdiction upon the same subject-matter between the same parties for the same purpose. He then proceeded to describe the cause of action in that case, which, as he stated, was a sum of money, being a part of the consideration or price for the use of a valuable machine for which the plaintiffs had a patent; that the sum demanded was the complement of a whole, of which the sum demanded in the declaration in the former suit is the other part. Both declarations contained similar special

counts, and the court remarked that a decision in the one suit on those counts in favor of the plaintiffs necessarily included and virtually determined the sufficiency of the declaration to sustain the title of the plaintiffs and showed that the record was admissible in evidence.

Different views were entertained by the defendants, and they submitted the proposition that a judgment was not admissible in evidence as an estoppel unless the record showed that the very point it is sought to estop was distinctly presented by an issue, and that it was expressly found by the jury; but the court remarked that such a rule would be impracticable, as it would restrict the operation of *res judicata* within too narrow bounds, and the court decided that it was not necessary as between parties and privies that the record should show that matter of the estoppel was directly in issue, "but only that the said matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested, and that it was referred to the decision of the jury."

Attempt was made in that case to maintain the proposition that the judgment in the first suit could not be held to be an estoppel unless it was shown by the record that the very point in controversy was distinctly presented by an issue, and that it was explicitly found by the jury; but the court held otherwise and expressly overruled the proposition, although the defense of estoppel failed for other reasons.

Two notes, in another case, were given by the purchaser of a vessel to the vendor of the same, and payment of the first note being refused, the payee sued the maker, and the maker, at the trial, set up as a defense that the vessel was rotten and unseaworthy at the time of sale, and that those facts were known to the plaintiff. They went to trial, and the verdict and judgment were for the defendant. Subsequently the plaintiff sued the other note, and the defendant set up the judgment in the other case as a bar to the suit, and the supreme court of New York sustained the defense, holding that the former judgment, whether pleaded as an estoppel or given in evidence under the general issue, was conclusive that the sale was fraudulent and that the plaintiff could not recover in the second action. *Gardner v. Buckbee*, 3 Cow., 127.

Certain sums of money, in a later case, were paid by a surety on two bonds given by an importer, in which the plaintiff and defendant were sureties. They were jointly liable, but the plaintiff paid the whole amount and brought suit against the other surety for contribution. Service was made, and the defendant appeared and set up the defense that he had been released, with the consent of the plaintiff, before the payment was made, and the court sustained the defense upon demurrer and gave judgment for the defendant.

Moneys were also paid by the same surety to discharge the liability under the second bond. Contribution being refused, the plaintiff brought a second suit and the defendant set up the former judgment as a bar, and the court sustained the defense, it appearing that both bonds were given at the same time upon the same consideration, and as part of one and the same transaction. *Bouchard v. Dias*, 3 Den., 243.

Neither of the second suits in the two preceding cases was for the same cause of action as the first, but the defense was sustained as in *Outram v. Morewood*, 3 East, 358, because the suit was founded upon the same title. Cases of that kind are quite numerous, and they show to a demonstration that a judgment may be a bar if the same title is involved, even though the cause of action may be founded on a different instrument, or for a different trespass

upon the same premises. Conclusive support to that proposition is found in repeated decisions, of which the following are striking examples: *Burt v. Sternburgh*, 4 Cow., 583; *Whittaker v. Jackson*, 2 Hurlst. & Colt., 931; *Strutt v. Bovingdon*, 5 Esp., 59.

In order to make a judgment conclusive, it is not necessary, said Mr. Justice Bigelow, that the cause of action should be the same in the first suit as that in which the judgment is pleaded or given in evidence, but it is essential that the issue should be the same. The judgment is then co-extensive with the issue on which it is founded, and is conclusive only so far as the same fact or title is again in dispute. *Merriam v. Whittemore*, 5 Gray, 317.

Decided cases in that state to the same effect are numerous, the highest court of the state holding that it is well settled that a judgment in a former suit between the same parties is a bar to a subsequent action only when the point or question in issue is the same in both; that the judgment is conclusive in relation to all matters in the suit which were put in issue, but has no effect upon questions not involved in the issue and which were neither open to inquiry nor the subjects of litigation. *Norton v. Huxley*, 13 id., 290.

Damages were claimed by the plaintiff for the loss of his shop by fire communicated to it by the defendants' locomotive engine, and he recovered judgment for the injury. He subsequently brought a second suit for the loss of his dwelling-house and shed by fire, it appearing that the house and shed took fire from the shop. Process being served, the defendants appeared and set up the former judgment as a bar. The court sustained the defense, holding that the plaintiff did not show any right to maintain another action merely by proving his omission to produce upon the trial all the evidence which was admissible in his behalf, and that having chosen to submit his case upon the evidence introduced he was bound to abide by the verdict and judgment in the first suit. *Trask v. Railroad*, 2 Allen, 332.

Where a party took a bill of sale of property from the owner, and the same was subsequently attached by an officer at the suit of the creditors of the former owner, and the purchaser under the bill of sale having converted part of the property to his own use was sued by the officer and the latter recovered judgment upon the ground that the bill of sale was fraudulent and void as to the creditors, it was held that the judgment was a bar to a subsequent suit of replevin commenced by the grantee in the bill of sale for the residue of the property in the hands of the officer. *Doty v. Brown*, 4 Comst., 75.

Beyond question, the bar is not defeated because the subject-matter of the second suit is different from the first if it be founded on the same title; and the supreme court of Pennsylvania have held in accordance with that view, that a judgment in trespass upon a traverse of *liberum tenementum* estops the party against whom it has been rendered, and his privies, from afterward controverting the title to the same freehold in a subsequent action of trespass. *Stevens v. Hughes*, 31 Penn. St., 385; *Hatch v. Garza*, 22 Tex., 187; *Clark v. Sammons*, 12 Ia., 370.

Tested by these several considerations, it is clear that a former judgment is a bar in all cases where the matters put in issue in the first suit were the same as the matters in issue in the second suit. *Ricardo v. Garcias*, 12 Cl. & Fin., 401; *Beloit v. Morgan*, 7 Wall., 623. "It results from these authorities that an adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is pronounced, but in every other where the right or title is the same, although the cause of action may be different." 2 Smith, Lead. Cas

(7th Am. ed.), 788, 789; Bigelow on Estoppel (2d ed.), 45; *Aurora City v. West*, 7 Wall., 96; *Outram v. Morewood*, 3 East, 346; *Gould v. Railroad Company*, 91 U. S., 526 (§ 710, *infra*).

Grant that, and still it is suggested that the plaintiff in the suit on the coupons did not introduce evidence to prove that he paid value for the bonds with the coupons; but the answer to that is that he might have done so. He alleged in the declaration that he paid value, and consequently he might have given evidence to prove it, which shows that the question was directly involved in the issue between the parties.

Doubtless the plaintiff neglected to give evidence in that behalf, for the reason that he and his counsel were of the opinion that the evidence introduced by the defendants was not sufficient to repel the *prima facie* presumption arising from his possession of the instruments, that he paid value for the transfer, and I am still of that opinion; but the remedy of the plaintiff, if surprised, was to except to the ruling or to submit a motion for new trial.

Suggestions of that sort are now too late, nor are they sufficient to modify the effect of the judgment. When once finally rendered the judgment must be considered conclusive, else litigation will be endless. Litigants sometimes prefer not to bring forward their whole case or defense, in order to enjoy the opportunity to bring up a reserve in case of defeat in the first contest; but a rule which would sanction that practice would be against public policy, as it would enable a party to protract the litigation as long as he could find means or credit to compel the attendance of witnesses and to secure the services of counsel.

#### RUSSELL v. PLACE.

(4 Otto, 606-610. 1876.)

APPEAL from U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This is a suit for an infringement of a patent to the complainant for an alleged new and useful improvement in the preparation of leather, and is similar in its general features to the suit of the complainant against Dodge, 93 U. S., 460. It is submitted upon substantially the same testimony, and presents, with one exception, the same questions for determination. That exception relates to the operation, as an estoppel against setting up the defenses here made, of a judgment recovered by the complainant against the defendants in an action at law for the infringement of the patent.

The bill of complaint sets forth the invention claimed, the issue of a patent for the same, its surrender for alleged defective and insufficient description of the invention, its re-issue with an amended specification, and the recovery of judgment against the defendants for damages in an action at law for a violation of the exclusive privileges secured by the patent. The bill then alleges the subsequent manufacture, use and sale by the defendants, without the license of the patentee, of the alleged invention and improvement, and prays that they may be decreed to account for the gains and profits thus acquired by them, and be enjoined from further infringement.

The answer admits the issue of the patent, its surrender and re-issue, and, as a defense to this suit, sets up in substance the want of novelty in the invention, its use by the public for more than two years prior to the application for the patent, and that the re-issue, so far as it differs from the original patent, is not for the same invention. The answer also admits the recovery by the com-

plainant in the action at law of the judgment mentioned, but denies that the same issues were involved or tried in that action which are raised in this suit.

The action at law was brought in the circuit court of the United States for the northern district of New York, in the ordinary form of such actions for infringement of the privileges secured by a patent. The defendants pleaded the general issue, and set up, by special notice under the act of congress, the want of novelty in the invention, and its use by the public for more than two years prior to the application for a patent. The plaintiff obtained a verdict for damages, upon which the judgment mentioned was entered; and this judgment, it is now insisted, estops the defendants in this suit from insisting upon the want of novelty in the invention patented, and its prior use by the public, and also from insisting upon any ground going to the validity of the patent which might have been availed of as a defense in that action, and, of course, upon the want of identity in the invention covered by the re-issue with that of the original patent.

§ 689. *Judgment of court of competent jurisdiction conclusive as to same question in another suit between same parties.*

It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record — as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed without indicating which of them was thus litigated, and upon which the judgment was rendered — the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

Thus, in the case of *The Washington, Alexandria & Georgetown Steam-Packet Company v. Sickles*, 24 How., 333 (§§ 681–82, *supra*), a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration, containing a special count upon a contract and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

When the same case was before this court the second time (*Packet Company v. Sickles*, 5 Wall., 580; *Ev.*, §§ 2639–48), the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined — that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.

§ 690. *Recovery of judgment on one claim for patent not conclusive as to infringement of another claim.*

Tested by these views, the question presented by the plaintiff in this case, upon the effect as evidence of the verdict and judgment in the action at law, is of easy solution. The record of that action does not disclose the nature of the infringement for which damages were recovered. The declaration only avers that the plaintiff was the original and first inventor of a new and useful improvement in the preparation of leather, and that he obtained a patent for the same, and, on its surrender, a new patent, with an amended specification, without describing with other particularity the nature and operation of the invention; and alleges, as the infringement complained of, that the defendants have made and used the invention, and have caused others to make and use it. The patent contains two claims: one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheep-skin by means of a compound composed and applied in a particular manner. Whether the infringement for which the verdict and judgment passed consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified, does not appear from the record. A recovery for an infringement of one claim of the patent is not of itself conclusive of an infringement of the other claim, and there was no extrinsic evidence offered to remove the uncertainty upon the record; it is left to conjecture what was in fact litigated and determined. The verdict may have been for an infringement of the first claim; it may have been for an infringement of the second; it may have been for an infringement of both. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery. A patent may be valid as to a single claim and not valid as to the others. The record wants, therefore, that certainty which is essential to its operation as an estoppel, and does not conclude the defendants from contesting the infringement or the validity of the patent in this suit.

The record is not unlike a record in an action for money had and received to the plaintiff's use. It would be impossible to affirm from such a record, with certainty, for what moneys thus received the action was brought, without extrinsic evidence showing the fact; and, of course, without such evidence the verdict and judgment would conclude nothing, except as to the amount of indebtedness established.

§ 691. *An estoppel must be certain.*

According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. See *Aiken v. Peck*, 22 Vt., 260, and *Hooker v. Hubbard*, 102 Mass., 245.

*Decree affirmed.*

MR. JUSTICE CLIFFORD dissented.

#### SMITH v. TOWN OF ONTARIO.

(Circuit Court for New York: 18 Blatchford, 454-459. 1880.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—This motion for a new trial involves the single question whether or not the judgment in the former action between the parties concludes the plaintiff upon the issues in the present suit. The former action

was brought to recover instalments of interest on certain bonds of the defendant, falling due April 1, 1875. The present action is to recover instalments of interest on the same bonds, falling due April 1, 1876. In the first action a verdict for the defendant was directed by the court, and judgment was entered accordingly. The defendant now insists upon that judgment as conclusively establishing the defense that the bonds are invalid. The complaint in the first action alleged, in substance, that the bonds were executed and issued by agents of the defendant in compliance with authority conferred upon the agents by statute. The answer controverted these allegations. Upon the trial, the defendant moved the court to direct a verdict for the defendant, upon the ground that the agents had issued the bonds without compliance with the statute in several specified particulars. The court ruled with the defendant and ordered a verdict accordingly. In the present action the same issue is presented by the pleadings, but, upon the trial, the plaintiff proved that, after the bonds had been issued, the defendant ratified the acts of the agents in executing and issuing the bonds. In the former action some evidence was given which tended to prove a ratification, but the point whether there had been such ratification or not was not decided or considered. The precise question now is, whether the plaintiff is precluded by the former adjudication from showing that, although the bonds were originally issued by the agents of the defendant without authority, their acts were afterwards ratified by their principal.

§ 692. *Rule as to estoppel by former judgment.*

In a recent case of controlling authority (*Cromwell v. County of Sac*, 94 U. S., 351; §§ 685-88, *supra*), the rules which furnish the test whether or not a former adjudication is an estoppel have been defined so explicitly as to remove the uncertainty which has existed in a class of cases as to which there have been many conflicting expressions. The general rule, that the judgment of a court of concurrent jurisdiction is, as a plea at bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court, has been repeated in all the adjudications since it was enunciated by Lord Chief Justice De Gray in *The Duchess of Kingston's Case*, 2 Smith's Lead. Cas., 424; but many authorities are found which declare that the estoppel applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but also to every point which belonged to the subject of the issue, and which the parties might have brought forward at the time. Perhaps no more striking illustration of the extent to which this doctrine has been carried can be found than in the decisions of the court of appeals of this state, where it is held that a recovery by a surgeon for professional services is conclusive in his favor when subsequently sued for malpractice in performing such services, although the point whether the services were properly performed was not presented or contested in the former suit. *Gates v. Preston*, 41 N. Y., 113; *Blair v. Bartlett*, 75 N. Y., 150. It is unnecessary to refer to cases like *Davis v. Hedges*, L. R., 6 Q. B., 687, and *Mondel v. Steel*, 8 Mees. & W., 858, which are directly to the contrary effect; but there are expressions of opinion in cases in the supreme court, prior to *Cromwell v. County of Sac*, which indicate that the estoppel extends not only to the matters of fact and law which were decided in the former action, but also to the grounds of recovery or defense which might have been but were not presented. *Beloit v. Morgan*, 7 Wall., 619; *Aurora v. West*, 7 Wall., 82.

In *Cromwell v. County of Sac*, however, the conclusiveness of the estoppel,



as to all matters which might have been litigated but were not in fact, is confined to cases where the second action is brought upon the same claim or cause of action as that on which the first was brought; and it is held that when the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted in the former action upon the determination of which the finding or verdict was rendered. Accordingly, it was decided that, where the plaintiff had been defeated in an action upon coupons of county bonds upon the ground that the bonds were void against the county because they had been fraudulently issued by the county judge, that judgment did not conclude the plaintiff in a subsequent action against the county, brought upon subsequently maturing coupons of the same bonds, in which it was made to appear that the plaintiff was an innocent purchaser of the coupons for value and before maturity. The decision proceeds upon the ground that the question whether the bonds were void as against an innocent holder for value and before maturity was not litigated or determined in the former suit, and was, therefore, open to be litigated in the second action.

Accepting *Cromwell v. County of Sac* as decisive of the doctrine that the former adjudication is an estoppel only as to the matters in issue or points in controversy upon the determination of which the finding or verdict was rendered, it remains to apply that doctrine to the present case. Concededly, it was not decided that the acts of the agents in issuing the bonds did not bind the defendant, notwithstanding the defendant ratified the transaction, because the effect of the ratification was not considered. But it was decided, upon all the evidence in the case, that the acts of the agents were not binding upon the defendant. Now, what was the matter in issue or the point in controversy, in that action, within the meaning of the rules of estoppel? *Cromwell v. County of Sac* is an authority that, in an action where there was no issue as to the right of a *bona fide* purchaser to recover upon bonds, that question was not concluded, in a subsequent action, by the adjudication in the former action. But that case does not decide that a former adjudication will not be conclusive upon a given question unless the decision turned upon precisely the same evidence as that which was introduced in the subsequent action. The doctrine of estoppel becomes of very little practical value, if, whenever a former adjudication is relied on, the former can be distinguished from the second by some variations in the evidence. The matter in issue, or point in controversy, may involve a number of minor issues, and it cannot be said not to have been decided because some of these minor issues were not specifically considered.

§ 693. *The term "matter in issue" defined.*

The "matter in issue" has been defined, in a case of leading authority, as "that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading." *King v. Chase*, 15 N. H., 9. The issues presented by the pleadings may be modified by the proceedings upon the trial, as, where a defense is withdrawn from consideration or where a count in the declaration is abandoned. However this may be, the matter in issue, or the point in controversy, is that ultimate fact or state of facts in dispute, upon which the verdict or finding is predicated. If, in an action upon a note, the defendant denies the execution of the note, and a verdict is found for the plaintiff, the fact that the defendant executed the note is established finally, for the purpose of all subsequent litigation between the parties. It

may be that this conclusion was reached upon the consideration of various subordinate facts which do not appear in the subsequent action, or which stand altered by the case newly presented, yet the matter in issue is concluded by the former adjudication. So, in an action against a principal, upon a contract made by an agent, where the defendant denies the agency, and the judgment is for the defendant, the fact that there was no agency is forever established for the purposes of future actions between the parties. It may be that the fact of agency was attempted to be proved, on the trial of the former action, by showing that the defendant had held out the person as his agent; but the conclusiveness of the adjudication could not be overthrown, in a subsequent action, by proof of a written authority which was not given upon the trial of the former action. In short, whatever is merely matter of evidence becomes of no importance after the determination of the matter in issue. If these views are correct, it is not difficult to determine what was the matter in issue or point in controversy in the present case. The issue was, whether or not the acts of the agents in issuing the bonds were, in fact and in law, the acts of the defendant. It was determined that they were not. The point in controversy was not how or whereby the acts of the agents became the acts of the principal, but whether they were so. The plaintiff sought to establish the issue in his favor by showing a statutory authority in the agents. Instead of doing this the plaintiff might have shown that the defendant had adopted the acts done in its behalf. A subsequent ratification is equivalent to an original authorization. Either mode of proving the agency was permissible under the pleadings, and the allegations of the pleadings in that behalf are the same in the present action as in the former one. The ultimate fact to be proved was the agency; the manner of proving it was merely a matter of evidence. The plaintiff can no more be permitted to reopen the matter in issue thus settled, by the new evidence which he offered here, than he could be by giving in evidence new or additional facts showing compliance with the statutory requirements.

Unless these conclusions express the correct view of the effect of a former adjudication, it would be wiser to abrogate all the rules which comprise the law of estoppel relating to the conclusiveness of former judgments. They are intended to give permanence to established rights, by refusing to reopen controversies which have once been tried, and in which the parties have had full opportunity to bring forward their proofs and present the merits of their case. If a controversy once tried and determined is to have no effect whenever different evidence upon the same matter in issue can be produced, the only practical result would be to add to the ordinary complications of a trial those which would arise by retrying at the same time a former controversy also. The motion for a new trial is denied.

#### DURANT v. ESSEX COMPANY.

(7 Wallace, 107-113. 1868.)

APPEAL from U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—In October, 1848, Durant filed his bill against the Essex Company for certain real estate. The court dismissed the bill. On appeal to this court the judges were equally divided, and an order was entered that the decree of the court below be affirmed. Complainant then filed a similar bill in the court below for the same relief and the same thing. Defend-

ant pleaded the former suit and decree in bar. The court sustained the plea and refused complainant's motion to discontinue the suit, or that the bill be dismissed without prejudice.

§ 694. *Effect of decree of dismissal.*

Opinion by MR. JUSTICE FIELD.

The decree dismissing the bill in the former suit in the circuit court of the United States, being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. *Walden v. Bodley*, 14 Pet., 156; *Hughes v. United States*, 4 Wall., 237; *Bigelow v. Winsor*, 1 Gray, 301; *Foote v. Gibbs*, id., 412.

Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal. *Lindsay v. Lynch*, 2 Sch. & Lef., 10; *Woollam v. Hearn*, 7 Ves., 222; *Stevens v. Guppy*, 3 Russ., 185; *Sewall v. Eastern R. Co.*, 9 Cush., 13; *Miles v. Caldwell*, 2 Wall., 45; *Carneal v. Banks*, 10 Wheat., 192; *Dandridge v. Washington*, 2 Pet., 378; *Piersoll v. Elliott*, 6 id., 100 (*Equerry*, § 812); *Gaylords v. Kelshaw*, 1 Wall., 83; *Barney v. Baltimore*, 6 id., 289 (*Courts*, §§ 1221-25); *Hobson v. McArthur*, 16 Pet., 195.

In the case in the circuit court we are not left to conjectures or to presumptions as to what was intended by the decree. The plea of the defendants avers that testimony was taken on both sides, and that the case was heard on its merits and argued by counsel. And when the mandate of this court was filed the complainant moved for leave to discontinue the suit, or that the bill be dismissed without prejudice; but the motion was denied and the decree was affirmed.

§ 695. *Judgment of affirmance by a divided court conclusive.*

There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and therefore ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made. If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings. If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment or order stands in full force, to be carried into effect by the ordinary means.

Thus, in *Iveson v. Moore*, 1 Salk., 15; S. C., 1 Id. Raym., 495, a verdict was rendered for the plaintiff, and, according to the practice prevailing in the English

courts, a rule was entered for judgment *nisi*. Afterwards a rule was obtained that the judgment should be arrested *nisi*—that is, unless cause be shown against the arrest. On motion to discharge this latter rule the judges were equally divided, and no order could be made. But the court said, if “it had been divided on the first motion [that is, the motion against the judgment under the general rule], the plaintiff might have entered judgment; but now this rule [in arrest] must stand or be discharged, and discharged it cannot be, for the court is equally divided.” The inability of the court, from the division, to take affirmative action, would have allowed the plaintiff to enter his judgment under the general rule if no order in arrest had been made; but that being made, the position of the parties was changed.

In *Chapman v. Lamphire*, 3 Mod., 155, the plaintiff obtained a verdict, upon which the usual rule was entered for judgment *nisi*, in accordance with the established practice. A motion was then made for the arrest of the judgment, and it is reported that “the judges were divided in opinion, two against two, and so the plaintiff had his judgment, there being no rule made to stay it, so that he had his judgment upon his general rule for judgment; but if it had been upon a demurrer or special verdict, then it would have been adjourned to the exchequer chamber.”

By a law of England, passed as long ago as 14 Edward III., if the judges of the king's bench, or common pleas, are equally divided, the case is to be adjourned to the exchequer chamber, and be there argued before all the justices of England. If these are equally divided, it is to be determined at the next parliament by a prelate, two earls, and two barons, with the advice of the lords chancellor, and treasurer, the judges, and other of the king's council. Comyn's Digest, title Court, D. 5; Coke Litt., 71, 2.

In the case of the special verdict, affirmative action would be required to enter judgment, which would be impossible from the division of the judges. But in the case of the demurrer, the effect of a division would depend, we think, upon the rules of practice established in such cases, for, in the absence of a settled practice or general rule of court upon the subject, the judges disagreeing as to the demurrer might disagree also as to the effect of their inability to decide it, as was the fact in this court in the case between the commonwealth of Virginia and West Virginia, argued upon demurrer to the bill at the last term.

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

The *Antelope*, 10 Wheat., 66, and *Etting v. The Bank of the United States*, 11 id., 59, are cases where the decisions of the court below, or some part of them, were affirmed upon a division of the judges, and a term seldom passes in which there are not several cases disposed of in this way. In *Brown v. Aspden*, 14 How., 23 (APPEALS, §§ 2473-75), Chief Justice Taney observed that there was no difference between a decree in chancery and a judgment at

law as to its affirmance on a division of the court. "In both cases," he said, "the motion is to reverse, and if that fails, the judgment, or decree, necessarily stands."

It is also the practice of the exchequer chamber in England to affirm the judgment of the court below, brought before it on a writ of error, when the judges are equally divided. Where a case is adjourned to that court, under the statute of 14 Edward III., upon a division of the judges of the court below, the practice, as we have stated, is different. But on writs of error it is similar to that followed by this court. Such, also, is the practice of the house of lords when sitting as a court of appeals. It is said that this practice depends upon the manner in which the lords put the question, which is always in this form: Shall this judgment, or decree, be reversed? But that is the question in all appellate courts, and the particular manner in which the question is stated cannot change the rule of law on the subject. See *Bridge v. Johnson*, 5 Wend., 372.

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to show the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

*Judgment affirmed.*

#### HALDEMAN v. UNITED STATES.

(1 Otto, 584-586. 1875.)

ERROR to U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE DAVIS.

**STATEMENT OF FACTS.**—This is an action of debt against the plaintiffs in error on a bond conditioned for the performance of official duty by Halde-  
man, as surveyor of the customs, and depository of the public moneys, at Louisville, Ky. They pleaded four pleas of judgment recovered for the same cause of action, to each of which the court below sustained a demurrer. The correctness of these rulings presents the only point in the case.

#### § 696. *Effect of simple judgment of dismissal.*

It is a general rule that a plea of former recovery, whether it be by confession, verdict or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law, which requires an end to the litigation after its merits have been determined. But there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. Conceding that this action is between the same parties as well as for the same subject-matter as the former one, are the United States barred from a recovery by reason of anything alleged in the pleas? The first, second and fourth pleas are not essentially different. In each the judgment relied on is "that the said suit is not prosecuted, and be dismissed." This entry is nothing more than the record of a nonsuit, although the customary technical language is not used.

§ 696a. *Effect of nonsuit and payment of costs.*

But the plaintiffs in error deny that this is the effect of the order, and insist that the pleas present a case of *retraxit*, by which the United States forever lost their action, because they voluntarily announced to the court that, on the defendants' paying the costs, the suit would be dismissed. Such an announcement does not imply that they had no cause of action, or, if they had, that they intended to renounce it, or that it was adjusted. Nonsuits are frequently taken, on payment of costs by the adverse party, in order that the controversy may be arranged out of court; but they do not preclude the institution and maintenance of subsequent suits in case of failure to settle the matters in dispute. The defendants, by consenting to pay the costs, gained delay, if nothing more. This doubtless served their purpose; but the idea of turning the mere withdrawal of a suit into an intentional abandonment of the claim or demand asserted thereby is an afterthought.

§ 697. *The words "dismissed agreed" in the judgment of a court do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment.*

The third plea alleges that the former suit was identical with this, and was "dismissed agreed" by the judgment of the court. If this plea is true, the others cannot be, for they recite the judgment differently; and there could have been but one record of the judgment, as there was but one suit. In general, a defendant may in different pleas state as many separate and independent grounds of defense as he may be advised is material; but this rule has no application to this case. There is but one defense presented, and that required only a single plea. More than this was unnecessary, and in violation of good practice. It is quite apparent, from the language of the record in the fourth plea (the only one which purports to give it in full), that there was no such entry of judgment as stated in the third plea; and on this account it should have been rejected. But, even if it truly recites the entry of judgment, it is still bad. There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively. The plea does not aver that the parties had by their agreement adjusted the matter in controversy, or that there was any adjudication thereon. Whatever may be the effect given by the courts of Kentucky to a judgment entry "dismissed agreed," it is manifest that the words do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment.

§ 698. *Effect of a general entry of dismissal of a suit by agreement.*

Suits are often dismissed by the parties; and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms which may be more or less important. They may refer to costs, or they may embrace a full settlement of the contested points; but, if they are sufficient to bar the plaintiff, the plea must show it. Tried by this test the third plea is, like the others, bad.

*Judgment affirmed.*

## BADGER v. BADGER.

(Circuit Court for Massachusetts: 1 Clifford, 237-246. 1859.)

**STATEMENT OF FACTS.**—Bill in equity to recover certain alleged interests in real estate. Plea of a former suit on the same subject-matter and between the same parties, which was regularly disposed of on the merits by a final decree of dismissal with costs. The case was heard on a replication to the plea, alleging a simple dismissal of the bill without a determination of the merits.

Opinion by CLIFFORD, J.

All of the matters of fact affirmatively set forth in the replication, which are well pleaded and material to the issue of law raised by the demurrer, must be considered as admitted. Conceding that rule to be correct, it then appears that, before the cause was set down for hearing, and before any of the testimony taken was published, the complainant moved to dismiss his bill, and no objection being made thereto, the motion was granted, and the bill of complaint was accordingly dismissed without any hearing whatever upon the merits.

§ 699. *When a decree of dismissal is not a bar.*

On this state of the case I am of the opinion that the replication is a good answer to the plea, and that the record of the former suit and decree is no bar to the bill of complaint. At the argument the attention of the court was specially drawn to the docket entries in the former suit, and, to prevent any further controversy upon this preliminary point, it may be well to refer to those entries. They are substantially as follows: On motion of the complainant, the time for taking testimony was extended to the 10th of May, 1858; and on the 3d of the same month the complainant moved the court further to enlarge the time for taking testimony, which motion was opposed by the respondents, and on the 10th of the same month the complainant renewed his motion, and the same was again objected to by the respondents, and thereupon it was ordered by the court, among other things, that leave be granted to the complainant to take a certain deposition; interrogatories to be filed on or before the 17th of May, in behalf of the complainant, and the deposition to be taken and returned within eighteen days from the time when the cross-interrogatories of the respondents are filed, and that publication be deferred until that time. Afterwards, on the 6th of September following, no such interrogatories or cross-interrogatories having been filed, the complainant moved the court that his bill of complaint be dismissed without prejudice, and after hearing had thereon the complainant's motion was denied by the court, and the complainant then moved that his bill of complaint be dismissed, and the court, having considered the motion, ordered and decreed accordingly, "that the bill of complaint in this cause be, and the same is hereby, dismissed, with costs for the respondents." From this statement it is quite evident that the allegations of the replication are correct. No order for publication was ever passed, and there was no hearing upon the merits of the controversy. Publication was expressly postponed, to give the complainant time to take a certain deposition; and to prevent unnecessary delay in taking it, the order was made that he should file interrogatories within a given time, and that the deposition should be taken and returned within eighteen days from the time when the cross-interrogatories were filed by the respondents. Such interrogatories and cross-interrogatories were never filed, and in point of fact the deposition had not

been taken at the time the complainant moved to dismiss his bill without prejudice. That motion was denied; but the complainant subsequently moved to dismiss his bill, omitting from the motion the words "without prejudice," and the order was accordingly made that the bill of complaint be dismissed with costs for the respondents.

§ 700. — *it seems that there must be a determination of the merits to make the decree a bar.*

It is insisted by the respondents that the decree in the former suit dismissing the bill was final and conclusive between these parties in all matters at issue in that suit, and that the effect of the decree in that behalf is not varied or diminished by the fact that the motion to dismiss it emanated from the complainant. On the other hand, it is insisted by the respondents that a decree or order dismissing a former suit, even though it was between the same parties, can only be pleaded in bar to a new bill for the same subject-matter when it appears that the dismissal was decreed or ordered after a hearing on the merits. Elementary writers usually lay down the rule in the first instance in general terms, that a decree or order of the court by which the rights of the parties have been determined, or another bill for the same cause has been dismissed, may be pleaded in bar to a new bill for the same matter. Such writers, however, generally admit that the decree or order in such cases can only be pleaded in bar where the dismissal actually took place upon the hearing. 2 Dan. Ch. Plead. and Prac., 758; Cooper's Plead., 270; 2 Madd. Ch., 248; 1 Smith, Ch., 223; 1 Barb. Ch., 126. Judge Story says a decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismissal was upon the hearing, and was not in terms directed to be without prejudice. But an order of dismissal is a bar only where the court has determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another suit. Story, Eq. Plead. (6th ed.), § 793, p. 700.

Prior to the new orders in England, the better opinion is that the plaintiff could obtain the common order dismissing his bill with costs at any time before the cause was actually heard by the court. All the cases agree that he could do so before the cause was called on for final hearing, and in many cases it is held that he could do so afterwards, and that the decree or order of dismissal could not be pleaded in bar to a new bill, provided it appeared that it was made without any determination of the merits. Take, for example, the case of *Carlington v. Holly*, 1 Dick. Ch., 280, where it appears that, at the time when the cause was called on for hearing, an issue was directed by the court, but the complainant, being advised that the bill and the matter put in issue were insufficient to support his claim, applied by motion and obtained the common order to dismiss his bill upon payment of costs. Afterwards the respondent applied to discharge the order for irregularity, upon the ground that the cause having been brought on to a hearing, the bill could not be dismissed except on a solemn judgment. Lord Hardwicke, however, held otherwise, and remarked in effect: "There has not been any determination, for the directing of an issue is merely to satisfy the conscience of the court prefatory to their giving judgment. The issue has not been tried, and, until there has been a determination, I hold a plaintiff may, in any stage of the cause, apply to dismiss his bill upon payment of costs." It would have been otherwise, he said, had the issue been tried and a verdict in favor of the defendant, because the de-



fendant might then have set the cause down as in equity reserved, in order to have the bill dismissed upon the solemn judgment of the court, so as to make the order of dismissal pleadable.

To the same effect also is the case of *Curtis v. Lloyd*, 4 Myl. & Cr., 194, which was decided by Lord Cottenham in 1833, after it had been twice argued at the bar. When that cause was called on for hearing, the counsel for the complainant stated that it had come on unexpectedly, and at his request it was allowed to stand over until the next day. On the following morning the cause was again called on for hearing, when the same counsel informed the court that he had that morning obtained an order, as of course, dismissing the bill with costs, and that the suit was no longer pending. Objection to that course of proceeding was promptly made by the counsel of the respondent. They insisted that it was not competent for the complainant, after the cause was set down for hearing, and still less after it had been actually called on, and had only been allowed to stand over at his request and for the accommodation of his counsel, to obtain behind the back of his adversary a common order dismissing his bill. Such an order, they insisted, was irregular, and ought to be treated as a nullity. But the chancellor said, after admitting that he was not before aware that the doctrine had been carried so far as it seemed to have been in the case of *Carrington v. Holly*, that he could not see why a complainant should be in a worse situation because he informed the court that he did not intend to proceed with the hearing of his cause than if he made default; and emphatically added that in principle it was substantially the same thing. Several cases were cited at the argument to sustain the propriety of the proceeding, and many others might have been added of like import. *Lock v. Nash*, 2 Madd. Ch., 389; *White v. Westmeath*, 1 Beav., 174; *Anonymous*, 1 Ves. Jr., 140; *Dixon v. Parks*, 1 Ves. Jr., 402; *Fidelle v. Evans*, 1 Bro. C. C., 267; *Knox v. Brown*, 2 Bro. C. C., 185; *Gilbert v. Faules*, *Freem. Ch.* (ed. 1823), 158.

From these authorities it clearly appears that a complainant, prior to the adoption of the new orders by the English chancery court, might dismiss his bill at any time before a hearing upon the merits, upon payment of costs, unless perhaps there had been some order or proceeding in the cause conferring rights upon the respondent which would be defeated or impaired by allowing that order. General authority is given to the supreme court, by the sixth section of the act of congress of the 23d of August, 1842, to regulate the whole practice of the circuit and district courts of the United States, but no rule specifically applicable to the matter in question has ever been adopted. 5 Stat. at Large, 518. By the ninetieth rule regulating the practice in equity suits, it is provided that, in all cases where the rules prescribed do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, not as positive rules, but as furnishing just analogies to regulate the practice. That rule adopts the English practice as it was known and understood in 1842, at the time this rule was ordained. Consequently the practice of this court remains unaffected by the new orders so called, which the courts of that country have since incorporated into their practice. What the practice was in the courts of that country prior to the adoption of the new orders has already appeared, and the authorities upon that subject need not be repeated. Several decisions of the supreme court may be adduced, which go very far to show that the practice here is substantially the same. Of these, the case of *Walden v. Bodley*, 14 Pet., 160,

is directly in point. Suits had been twice before instituted in that case, but it appeared that the first bill had been dismissed for the want of jurisdiction, and the second had also been dismissed on motion of the complainant at rules; and the court held that neither was a bar to the new bill, because it appeared in both records that the cause had not been heard on the merits.

Where a party asking the aid of a court of equity, says *Marshall, C. J.*, in *Conn v. Penn*, 5 Wheat., 427 (APPEALS, §§ 1707-8), refuses to comply with the conditions on which the aid must depend, the court is certainly correct in refusing its aid, and may dismiss the bill. But in such a case we think it would be harsh to make the decree of dismissal a bar to a future action. Some of the parties had been heard in that case, and a decree rendered which to a great extent decided the merits of the cause. Strong doubts, however, were expressed whether the decree was rendered on such a hearing as would make it a bar to a new bill; but as it appeared that one of the respondents was not before the court, and that another person concerned in interest was not made a party, the point as to the sufficiency of the hearing was not decided. Whenever a suit in chancery is heard upon the merits, a decree of a court having jurisdiction of the parties and of the subject-matter is a final determination of the controversy, unless the court making the decree qualify it and expressly order that it be made without prejudice. Accordingly it was held by the supreme court, in the case of *The Bank of the United States v. Beverly*, 1 How., 149, that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. Hence the judgment of a court of record or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this there is, and ought to be, no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing. *Hopkins v. Lea*, 6 Wheat., 109. Notwithstanding this rule, still it is well settled that a judgment of nonsuit at common law is no bar to a new suit, and cannot be pleaded in bar to a second action, although it is between the same parties, and for the same subject-matter, not even when the judgment of nonsuit was rendered upon an agreed statement of facts. It was so held by the supreme court in *Homer v. Brown*, 16 How., 354, and the same rule prevails in the state courts. *Bridge v. Sumner*, 1 Pick., 371; *Morgan v. Bliss*, 2 Mass., 113; *Wade v. Howard*, 8 Pick., 353; *Knox v. Waldoborough*, 5 Me., 185. So it would seem, from analogy, that whenever a bill of complaint is dismissed without a hearing, and without any consideration of the merits, whether with or without the consent of the complainant, that the order of dismissal, being in the nature of a nonsuit at common law, ought not to be considered a bar to a new suit, because the matters in controversy are not thereby judicially determined.

More direct authorities upon the subject, however, are to be found in the decisions of the state courts, where the question has often been presented. Where the respondent in a suit in equity pleaded a former suit, and a decree dismissing the bill in bar of a pending suit, Chancellor Kent held that the decree was not a bar, because it appeared that no person was present on the part of the complainant when the decree was made. *Rosse v. Rust*, 4 Johns. Ch., 300. Some of the remarks of the chancellor on that occasion are quite applicable to the present case. He said the merits of the former cause were never discussed, and no opinion of the court had ever been expressed upon them.

It is, therefore, not a case within the rule rendering a decree a bar to a new suit. The ground of this defense by plea is that the matter has been already decided, and here has been no decision on the matter. And he also referred with approbation to the remarks of Lord Hardwicke in *Brandlyn v. Ord*, 1 Atk., 571, in which that learned judge said that, where the defendant pleads a former suit, he must show that it was *res judicata*, or an absolute determination of the court that the plaintiff had no title. But the cases of *Perine v. Dunn*, 4 Johns. Ch., 140, and *Neafie v. Neafie*, 7 Johns. Ch., 1, are direct decisions of the questions here presented. In the former it was held that where a bill is dismissed on the merits, without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same matter, and in the latter it was held that a bill regularly dismissed on the merits may be pleaded in bar of a new bill for the same matter; but to make a decree of a dismissal of a bill on the merits a bar, it must be an absolute decision on the same point or matter, and the new bill must be between the same parties. Numerous other decisions affirm the same principles, and indeed the decided cases are nearly unanimous upon the subject. *Cummins v. Bennett*, 8 Paige, Ch., 79; *Simpson v. Brewster*, 9 Paige, Ch., 245; *Smith v. Sherwood*, 4 Conn., 276; *Kennedy et al. v. Scovil et al.*, 14 Conn., 61; *Smith v. Smith*, 2 Blackf., 232; *Seymour v. Gerome*, Walk. Ch., 356. Reference is very properly made in the argument to the opinion given by this court on the demurrer to the plea. All of the facts stated in the plea were then admitted by the demurrer, and the docket minutes in the former suit were not before the court. That opinion, therefore, was necessarily based upon the legal construction of the plea under the admissions of the demurrer. But whether correct or not, it is better to be right at last than finally to adhere to an error. Replication adjudged sufficient.

## CASE v. BEAUREGARD.

(11 Otto, 688-692. 1879.)

APPEAL from U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.—That the complainant's bill exhibits the same cause of action which was set forth in his former bill against these defendants, and that he now seeks the same relief as that which was sought in his first suit, is quite apparent. The identity of the claims and equities asserted, as well as of the relief asked, is shown by an inspection of the records, and it is hardly denied. The object of both suits was to follow and subject to the payment of a debt due by the partnership of May, Graham & Beauregard to the First National Bank of New Orleans, certain property alleged to have formerly belonged to the partnership, but which before the first bill was filed had been transferred to the railroad company. The claim made in each of the cases is that the bank has a privilege or lien upon the property for the partnership debt; that the railroad company acquired the property with knowledge of the existence of the lien, and that it is charged with a trust in favor of the bank. The decree dismissing the former bill must, therefore, be a bar to the present suit (it having been pleaded), unless the court which dismissed it was without jurisdiction of the case.

In the former bill it was not averred that judgment at law had ever been recovered against the partnership for the debt, and that an execution had been

issued thereon and returned fruitless. The present bill contains such an averment. It is alleged that judgments at law were obtained against two of the members of the partnership on or about the 26th day of February, 1873, which was after the decree dismissing the former bill, and that executions issued upon those judgments had been returned that no property could be found. The complainant insists that this averment not having been made in the former bill, the decree of dismissal, though unqualified, cannot be regarded as a final adjudication of the equities between the parties, and that it is, therefore, no bar to the present suit.

§ 701. *When a creditor's bill may be filed without a previous judgment at law.*

It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And generally it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is that, until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, or in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one, that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he had done all that he could do at law to obtain his rights.

But after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, "*Bona, sed impossibilia non cogit lex.*" It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. *Turner v. Adams* 46 Mo., 95; *Postlewait & Creagan and Keeler v. Howes*, 3 Ia., 365; *Ticonic Bank v. Harvey*, 16 id., 141; *Botsford v. Beers*, 11 Conn., 369; *Payne v. Sheldon*, 63 Barb. (N. Y.), 169. This is certainly true where the creditor has a lien or a trust in his favor.

So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him. *Thurmond and others v. Reese*, 3 Ga., 449; *Cornell v. Radway*, 22 Wis., 260; *Sanderson v. Stockdale*, 11 Md., 563.

In *Brisay v. Hogan*, 53 Mo., 554, it was ruled that when a creditor seeks by his bill to obtain payment of his debt from land paid for by the debtor, but conveyed to his wife, a levy of an execution is unnecessary, if the debtor never had legal title to the land. See, also, *Day v. Washburne*, 24 How., 352 (*Egurry*, § 1863).

The foundation upon which these and many other similar cases rest is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable

one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes.

§ 702. *With a trust in his favor, or a lien upon property, a creditor may go into a court of equity without a judgment in his favor.*

But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan v. Evans*, 11 N. H., 311; *Holt v. Bancroft*, 30 Ala., 193. Indeed, in those cases in which it has been held that obtaining a judgment, and issuing an execution, is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien, or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference.

Now, if we are correct in these views of equity jurisdiction, it is a plain inference that the decree pleaded in bar of the present suit was a final adjudication of the equities asserted by the complainant therein.

The bill in that case asserted in the most ample terms the remedilessness of the complainant at law. It averred that at and before the transfer and conveyances of the partnership property, sought to be charged, to the railroad company, each of the members of the partnership was largely indebted, without means and in a state of insolvency, and that they had since been and still were insolvent; so that a suit at law and the recovery of a judgment against them, or either of them, would not afford the complainant any relief, because neither of the partners have or had, since the dates of the pretended transfers of said partnership property, any property whatever upon which the complainant could levy an execution at law, or seize for the satisfaction of the debt due to the bank. What more could have been necessary to show that the complainant had no remedy at law,—that his remedy, if he had any, was in equity?

But this was not all. The bill charged that the conveyances of the partnership property, and the transfers by which it had been vested in the railroad company, were illegal and fraudulent, that the bank had a privilege or lien upon the property, and it prayed that the various acts of sale, transfer and conveyance by which the property that had belonged to the partnership had been conveyed to the railroad company, should be declared null and void, and that the property should be decreed to be liable to the payment of the amount due to the bank.

§ 703. *A decree of dismissal, determining the equities of the case, is a bar.*

Thus it appears the bill exhibited all that was necessary to give to the court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court, and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree.

Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants. It would be idle, therefore, to reconsider the question whether the bank has a lien upon the property he seeks to charge, or whether there had been a trust in the bank's favor.

*Decree affirmed.*

DERBY v. JACQUES.

(Circuit Court for Massachusetts: 1 Clifford, 425-439. 1890.)

**STATEMENT OF FACTS.**—Writ of right. The tenants pleaded the general issue, and for a second plea set up a former judgment rendered in a suit brought by the demandant and other parties against Samuel Jacques, father of the tenants, and Henry Hall. It appeared that the case was tried on an agreed statement of facts, and that the court found in favor of the tenants; that subsequently the demandants moved to have the record altered and a nonsuit entered, which was refused. The demandant demurs to this plea.

Opinion by CLIFFORD, J:

Three questions are raised by the demurrer for the consideration of the court. But for the sake of convenience, the order in which they are presented in the pleadings will be reversed. They are as follows: 1. Whether the plea is sufficient in point of form; and if so, then, 2. Whether the record of the former suit and judgment set forth in the plea is of a character to operate as a final and conclusive determination of the title of the parties in the court of the state where it was made; and if both of these questions are found in favor of the tenants, then, 3. Whether a judgment upon the merits rendered in this state, by a court having jurisdiction of the parties and the cause, in a plea of land, commenced and prosecuted by a writ of entry, is a bar to a writ of right subsequently prosecuted between the same parties, and for the same premises, in the federal courts.

§ 704. *Immaterial allegations of a plea may be rejected as surplusage.*

It is insisted by the demandant that the plea is double, and therefore bad in point of form, because it sets forth the proceedings in the court on the application of the demandant to amend the record, which proceedings took place subsequent to the rendition of the judgment, and are no part of the same. That suggestion would certainly have weight if those allegations of the plea were necessary to maintain the defense set up by the tenants; and it would clearly be well founded, under the circumstances of this case, if the other matters set forth in the plea did not remain in full force and wholly unaffected by those allegations. But it is obvious, if the judgment without those proceedings is of a character to operate as a final and conclusive determination of the title of the parties, then those proceedings are entirely immaterial to the issue of law raised by the demurrer; and if the judgment was not of such a character at the time the record of the judgment was made, still those proceedings are equally immaterial, because the record yet remains without any alteration whatever; so that the question whether the payment is or is not a bar to this suit, in any view that can be taken of the question, is wholly unaffected by those proceedings. According to the well-settled rules of pleading, therefore, the allegations of the plea setting forth those proceedings, which in themselves are entirely immaterial, may be rejected as surplusage; and if the other matters set forth in the plea are well pleaded, and constitute a sufficient an-

swer to the declaration, the allegations setting forth those proceedings do not vitiate the plea. Examples may be found where the immaterial averment is descriptive of the matter in controversy, or where the immaterial matter is so interwoven with the substance of the plea that the whole allegation becomes material and is subject to a traverse; but the present case falls within the well-known rule, that if the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation on the subject whatever was necessary, it may be rejected as surplusage and need not be proved; nor will it vitiate even on a special demurrer. 1 Chit. on Plead. (12th Am. ed.), 229; Stephen on Plead., 423; Co. Litt., 303, b.

§ 705. *Nonsuit at common law was a mere default, and the plaintiff could sue again.*

In the second place, it is insisted by the demandant that a judgment of nonsuit is never a bar to a new suit, and that the judgment set forth in the plea is a judgment of nonsuit. That proposition, being twofold, presents two questions, which will be separately considered. While the tenants do not controvert the first branch of the proposition, they expressly deny that the judgment in question is one of nonsuit, or that it was so intended or understood by the court before whom it was rendered. Nonsuit at common law was a mere default or neglect of the plaintiff to pursue his remedy, and therefore he was allowed to begin his suit again upon payment of costs. 3 Black. Com. by Shars., 296. Courts of justice could determine nothing at common law, unless both parties were present in person or by their attorneys, except in cases of default. In the course of the pleading, therefore, if either party neglected to put in his declaration, plea, replication, or the like, within the times allotted by the rules of the court, the plaintiff, if the omission was his, was said to be nonsuit; or if the negligence was on the side of the defendant, judgment was rendered against him for his default. Such a judgment, when rendered against the plaintiff, was only for the costs of the suit, and upon payment of the same he might bring a new action. Those rules of practice substantially obtain at the present time, and accordingly it has been determined by the highest authority that a judgment of nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit, although it was rendered by a court of competent jurisdiction and was between the same parties and for the same subject-matter. *Homer v. Brown*, 16 How., 354; *Morgan v. Bliss*, 2 Mass., 113; *Knox v. Waldborough*, 5 Me., 185; *Bridge v. Sumner*, 1 Pick., 370; *Wade v. Howard*, 8 Pick., 353. These cases fully justify the first branch of the proposition assumed by the demandant; but it by no means follows, as will presently appear, that all of the deductions attempted to be made from the admission can be sustained. Assuming that a judgment of nonsuit is not a bar to a new action, the more important inquiry arises in the case, what is the true nature of the judgment set up in the plea? To show that it is a judgment of nonsuit, and nothing more, the attention of the court is drawn by the counsel of the demandant to the various kinds of judgment as known and understood at common law. He assumes, in the language of a learned commentator, that the judgment of the court is the sentence of the law, and that there can be but four kinds of judgment in cases of this description. 1. Upon demurrer, where the facts are agreed by the parties and the law is determined by the court. 2. Where the law is admitted by the parties and the facts are disputed, as in case of judgments on verdicts. 3. Where the facts and law arising thereon are admitted by the defendant, as in judgments by confession

or default. 4. Where the plaintiff is convinced that the facts or the law, or both, are not sufficient to support his action, as in judgments on nonsuit, *re-traxit* and discontinuance. 3 Black. Com. by Shars., 395. That course of remark, however, is based upon the assumption that the practice in the courts of Massachusetts is the same in all respects as the practice was at common law; and inasmuch as a final judgment on an agreed statement of facts was unknown in the early jurisprudence of the parent country, so it is insisted that such an agreed statement cannot now be regarded as the proper foundation of such a judgment as will conclusively determine the rights of the parties and constitute a bar to a new suit. Much reason exists to suppose that such was the theory of the common law. General verdicts, however, were often taken subject to the opinion of the court on a special case stated by the counsel; but as nothing appeared on the record except the general verdict, the parties were precluded from the benefit of a writ of error. 3 Black. Com. by Shars., 377.

§ 706. *Judgment upon an agreed case.*

At one time strong doubts were entertained whether a writ of error would lie in the supreme court on a judgment rendered in the circuit court upon an agreed case. *Keene v. Whittaker*, 13 Pet., 459. Those doubts, however, were soon removed when, upon an examination of the question, it was found that the practice of the court had been to sustain writs of error in such cases almost from the time of its organization. *Faw v. Roberdeau*, 3 Cranch, 173; *Tucker v. Oxley*, 5 Cranch, 34; *Kennedy v. Brent*, 6 Cranch, 187; *Brent v. Chapman*, 5 Cranch, 358; *Shankland v. The Corporation of Washington*, 5 Pet., 390; *Inglee v. Coolidge*, 2 Wheat., 363; *Miller v. Nicholls*, 4 Wheat., 311. Three cases have since been reported, in which the point has been directly adjudicated, so that the question may now be considered as closed. *United States v. Eliason*, 16 Pet., 301; *Stimpson v. Railroad Co.*, 10 How., 329; *Graham v. Bayne*, 18 How., 60 (APPEALS, §§ 100-102); *Suydam v. Williamson*, 20 How., 427 (APPEALS, §§ 1917-30). General usage in the courts of Massachusetts, "whereof the memory of man runneth not to the contrary," has sanctioned this mode of trial until it has become a part of the common law of the state. Cases are often submitted to the court in that mode, without any other pleading than the declaration. Issues are seldom or never framed in such submissions, except so far as they arise out of the statement of the case. When the practice commenced is not known, and in all probability it would be as vain as it would be useless to attempt to trace its origin. Four cases at least, where the trial was in that mode, are reported in the first volume of the Massachusetts Reports. They were all conducted by eminent counsel, and were severally heard and decided by a learned court. *Livermore v. The Newburyport Ins. Co.*, 1 Mass., 264; *Payson, Adm'r, v. Payson et al.*, 1 Mass., 284; *Gordon et al. v. Pearson*, 1 Mass., 324; *Porter v. Bussey*, 1 Mass., 435. No one can read any one of those cases and fail to see that the practice as now known and universally understood was at that early period equally familiar to the bar and the court. From the year 1804 to the present time, the practice of trying causes in that mode has constantly increased, and it was never doubted, so far as appears, that a judgment rendered on such a foundation, if purporting in its terms to be a final judgment, was a conclusive determination of the matter in controversy, and as such that it might be pleaded in bar to a new suit between the same parties for the same cause of action. Maine at that period was a part of Massachusetts, but since the act of separation, her courts have adopted and



sanctioned the same practice, which has been continued to the present time. *Hubbard v. Cummings*, 1 Me., 11; *Fosdick v. Gooding et al.*, 1 Me., 30; *Lincoln and Kennebec Bank v. Richardson*, 1 Me., 79; *Hallowell v. Gardiner*, 1 Me., 93; *Jewett v. The County of Somerset*, 1 Me., 125.

To admit that there can be a doubt upon this question would be to prejudice vast interests long since supposed to rest upon the irrevocable determinations of the courts. There is no ground for doubt upon the subject, any more than in respect to a judgment on the verdict of a jury. Having come to this conclusion, it now becomes necessary to examine the agreement under which the cause was submitted to the determination of the court. Such agreements are usually appended to the statement in the case, and in fact form a necessary part of it. *Livermore v. Newburyport Ins. Co.*, 1 Mass., 269. In the first place, the plea states that the parties appeared at a regular term of the court, and agreed to submit the action to the decision of the court, on the following statement of facts: That agreement recites the nature of the action, describes in general terms the land in controversy, and contains a full statement of the evidence of title on which each party relied. By the terms of the agreement it was stipulated, 1. That if the court came to the conclusion, on the facts stated, that the demandants had no right to any part of the demanded premises, then the demandants were to become nonsuit, and judgment was to be entered for the tenants. 2. On the other hand, if the court, in view of the facts, came to the conclusion that the title to the whole of the premises in question was in the demandants, *then the tenants were to be defaulted* and judgment was to be entered accordingly. 3. But if the circumstances were such, in the opinion of the court, that the tenants might have acquired title to any portion of the demanded premises by adverse possession, then, although the paper evidence showed the title to be in the demandants, still the court was authorized to refer the matter to three commissioners with such instructions as the court might see fit to give, in order that the commissioners might determine to what, if any, part of the same premises the tenants had acquired a title by such adverse possession; but it was expressly stipulated that the return of the commissioners should be conclusive between the parties and that judgment should be entered accordingly.

Under each of the three clauses of the agreement already cited, the parties themselves prescribed the judgment which the court should enter in the case. No discretion whatever was vested in the court as to the judgment to be rendered under any one of those three clauses of the agreement. Demandants were to be nonsuited under the first clause, and the tenants were to be defaulted under the second, and judgment was to be rendered on the return of the commissioners under the third clause. Nothing, therefore, can be plainer than the fact that the court in giving the judgment in question did not act under any one of those three clauses. It is not pretended that the demandants were ever nonsuited, or that the tenants were defaulted, or that the cause was ever referred to commissioners. Were there no other clause in the agreement it would then be clear that the judgment was erroneous. Such, however, is not the fact, as appears from the fourth clause of the agreement, which provides as follows: "*Or the court may make any other order or judgment in the case which they shall think it may require.*" Under this last clause the whole controversy was submitted to the court on the facts stated without restriction or limitation. To suppose otherwise would be to do violence to the language employed, and to make a new agreement for the parties instead of expounding the one they

have made for themselves. It is suggested, however, that the fourth clause was intended to apply only to the special proceeding contemplated under the third, and that it should be so limited and qualified. But that suggestion cannot be sustained, for the reason that the third clause is as independent, full and complete as the first and second; and also, for the better reason that it expressly provides that "the return of the commissioners shall be conclusive between the parties, and judgment be entered accordingly."

Admitting this construction of the agreement to be correct, it then follows that it was entirely competent for the court to render judgment for the tenants or judgment for the demandants, accordingly as they found for the one or the other party; and such a judgment, undoubtedly, if properly entered, would be a conclusive determination of the matter in controversy in the courts of this state. Assuming that the court had power to render a final judgment for the tenants, the next inquiry is, was the judgment which they rendered one of that character? It is contended by the demandants that it is a judgment for costs only. No question is made as to the facts stated in the plea, but the argument on this point is addressed to the construction of the language employed by the court in giving the judgment, and the argument is that the language so employed, when taken in connection with the agreement under which the court acted, shows that the judgment is one for costs only, which impliedly admits that the language is correctly recited in the plea. Had there been any doubt as to the correctness of that part of the plea which recites the judgment, it should have been controverted by a proper replication. Under the admissions of the demurrer, it must be assumed that the judgment as recorded is a judgment for the tenants in the manner and form as stated in the plea. Taking that for granted, I am of the opinion that the judgment is in legal effect precisely what it purports to be,—a final judgment for the tenants. Clearly it is not a judgment of nonsuit, and therefore was not rendered under the first clause of the agreement; and it is equally clear that it could not have been rendered under the second clause, because it is a judgment for the tenants and not for the demandants. All agree that the third clause was inapplicable to the case, and that no such judgment as is therein contemplated could have been entered by the court, because the case was never referred to commissioners. It comes to this, then, either that the court acted under the fourth clause or they acted without authority. For the argument's sake, however, let it be admitted that the construction here given to the fourth clause is not correct and that the judgment is erroneous. Still, it is a final judgment of a court having jurisdiction of the cause and of the parties, and in the opinion of this court its validity cannot here be questioned.

§ 707. *Upon a plea of former judgment, the judgment is binding until reversed, if the court had jurisdiction.*

Where a court has such jurisdiction, it has a right to decide every question that arises in the cause, and, whether the decision be correct or not, the judgment, until reversed, must be regarded as binding in every other court. Errors and irregularities, if any, must be corrected by some direct proceeding to set the judgment aside, either before the same court or in an appellate court. *Elliot v. Peirsol*, 1 Pet., 340 (Ev., §§ 2024-31); *Thompson v. Tolmie*, 2 Pet., 168; *Cook v. Darling*, 18 Pick., 393; *Granger v. Clark*, 22 Me., 18; *Smith v. Keen*, 26 Me., 423; *Banister v. Higginson*, 15 Me., 73; *Simms v. Slacum*, 3 Cranch, 306; *Voorhees v. Bank of United States*, 10 Pet., 478. Lastly, it is insisted by the demandant that the judgment set up in the plea is not a bar to

this suit, because it was rendered in a plea of land commenced and prosecuted by a writ of entry.

§ 708. *Writ of right is the highest in the law.*

Beyond question the writ of right is, in its nature, the highest writ in the law. It lies only for the recovery of an estate in fee simple, and is the last resort of a party who has been ousted of real property. This writ, says Judge Blackstone, lies concurrently with all other real actions in which an estate of fee simple may be recovered, and it also lies after them, being as it were an appeal to the mere right when judgment hath been had as to the possession in an inferior possessory action. 3 Black. Com. by Shars., 193; Jackson on Real Actions, 276; Stearns on Real Actions, 350. Such a remedy still exists at common law, and it existed in the courts of Massachusetts until 1840, when it was abolished by statute. R. S. Mass., ch. 101, sec. 51. A writ of right was a proper remedy, in the courts of Massachusetts, as at common law, prior to that period; and it was held by the supreme court, in the case of *Homer v. Brown*, 16 How., 363, that the repeal of the statute conferring the remedy did not repeal it as process in the circuit court for this district. But the same court held, in the same case, that it was as process alone that it continued in the circuit court for this district, and that the action was subject to the limitation prescribed by the state law as to the time within which such a remedy may be prosecuted. Writs of right were abolished in Massachusetts before the rendition of the judgment set up in the plea of the tenants. When that judgment was rendered, therefore, the writ of entry was the highest writ known to the law of the state, and the judgment in question conclusively settled the title of the parties under the law of the state, so that the question here presented is not one respecting the form of the remedy, but presents the inquiry whether there can be one rule of property in the courts of the state, and another and a different rule touching the same subject-matter in the circuit court for the district. By the thirty-fourth section of the judiciary act, it is provided that the laws of the several states, except in certain cases not material to the present inquiry, shall be regarded as rules of decision in the courts of the United States in cases where they apply.

§ 709. *Where a state has abolished the writ of right a final judgment in an inferior writ may be pleaded in bar in the federal court in such state.*

Repeated decisions of the supreme court have established the doctrine that the federal courts adopt the local law of real property as ascertained by the decisions of the state courts, whether those decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state, which has become a fixed rule of property. *Jackson v. Chew*, 12 Wheat., 153 (EST. OF DEC., §§ 1590-92); *Henderson v. Griffin*, 5 Pet., 151; *Daly v. James*, 8 Wheat., 495 (EST. OF DEC., §§ 1577-80); *Lane v. Vick*, 3 How., 464 (EST. OF DEC., §§ 1514-15). While, therefore, a writ of right may still be maintained in the circuit court for this district, the common law rule that a final judgment in a writ of entry is not a bar to such a suit is no longer here in force; certainly not, if such judgment was recovered in the state court since the writ of right was abolished by the statute of the state. To regard the writ of right in the circuit court of the district as still overriding a final judgment recovered on a writ of entry in the state court, would present the anomaly of one rule of property in the state courts, and another and a different rule in the circuit court in respect to the same subject-matter. Infinite mischief would ensue from such a contrariety in the rules of property in the respective juris-

dictions, and it was to prevent such a state of things that the thirty-fourth section of the judiciary act was passed. That section does not apply to process; it merely furnishes a rule of decision, and was not intended to regulate the remedy. *M'Keen v. Delancy*, 5 Cranch, 22; *Wayman v. Southard*, 10 Wheat., 1; *Polk v. Wendall*, 9 Cranch, 87; *Mut. Ass. Society v. Watts*, 1 Wheat., 279; *Shipp v. Miller*, 2 Wheat., 316; *Thatcher v. Powell*, 6 Wheat., 119; *M'Cluny v. Sullivan*, 3 Pet., 270; *Green v. Neal*, 6 Pet., 291. In view of the whole case I am of the opinion that the plea of the tenants is sufficient, and constitutes a bar to the present suit. Demurrer overruled. Plea adjudged sufficient.

GOULD v. EVANSVILLE & CRAWFORDSVILLE RAILROAD COMPANY.

(1 Otto, 526-536. 1875.)

ERROR to U. S. Circuit Court, District of Indiana.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Special pleading is still allowed in certain jurisdictions; and, if the plaintiff and defendant, in such a forum, elect to submit their controversy in that form of pleading, the losing party must be content to abide the consequences of his own election.

Due service of process compels the defendant to appear, or to submit to a default; but, if he appears, he may, in most jurisdictions, elect to plead or demur, subject to the condition that, if he pleads to the declaration, the plaintiff may reply to his plea or demur; and the rule is, in case of a demurrer by the defendant to the declaration, or of a demurrer by the plaintiff to the plea of the defendant, if the other party joins in demurrer, it becomes the duty of the court to determine the question presented for decision; and if it involves the merits of the controversy, and is determined in favor of the party demurring, and the other party for any cause does not amend, the judgment is in chief; and it is settled law that such a judgment of the circuit court, if the sum or value in controversy is sufficient, may be removed into this court for re-examination by writ of error, under the twenty-second section of the judiciary act. *Suydam v. Williamson*, 20 How., 436 (APPEALS, §§ 1917-30); *Gorman v. Lenox*, 15 Pet., 115.

Pleadings which were subsequently abandoned will be passed over without notice, except to say that the suit was commenced by the testator in his lifetime. Briefly described, the suit referred to was an action of debt to recover the amount of a judgment which the testator of the plaintiff, as he alleged, recovered on the 3d of August, 1860, against the defendant corporation, in the supreme court of the state of New York, by virtue of a certain suit therein pending, in which, as the decedent alleged, the court there had jurisdiction of the parties and of the subject-matter of the action; and he also alleged that the judgment still remains in full force, and not in any wise vacated, reversed or satisfied. Defensive averments of a special character are also contained in the declaration; to which it will presently become necessary to refer in some detail, in order to determine the principal question presented for decision. Suffice it to remark in this connection that the testator of the plaintiff alleged in conclusion that, by virtue of the several allegations contained in the declaration, an action had accrued to him to demand and have of and from the defendant corporation the sum therein mentioned, with interest from the date of the judgment.

Service was made, and the corporation defendants, in the suit before the

court, appeared and pleaded in bar of the action a former judgment in their favor, rendered in the county circuit court of the state of Indiana for the same cause of action, as more fully set forth in the record; from which it appears that the testator of the present plaintiff, then in full life, impleaded the corporation defendants in an action of debt founded on the same judgment as that set up in the present suit, and alleged that he, the plaintiff, instituted his action in that case, in the supreme court of the state of New York, against the Evansville & Illinois Railroad Company, a corporation created by the laws of the state of Indiana; that the said corporation defendants appeared in the suit by attorney; that such proceedings therein were had, that he, on the 3d of August, 1860, recovered judgment against the said corporation defendants for the sum therein mentioned, being for the same amount, debt and cost as that specified in the judgment set up in the declaration of the case before the court; that the declaration in that case, as in the present case, alleged that the court which rendered the judgment was a court competent to try and determine the matter in controversy; and that the judgment remains in full force, unreversed and not paid.

Superadded to that, the defendants in the present suit allege, in their plea in bar, that the plaintiff averred in the former suit that the said Evansville & Illinois Railroad Company, by virtue of a law of the state of Indiana, consolidated their organization and charter with the organization and charter of the Wabash Railroad Company; that the two companies then and there and thereby became one company, by the corporate name of the Evansville & Crawfordsville Railroad Company; that the consolidated company then and there by that name took possession of all the rights, credits, effects and property of the two separate companies, and used and converted the same, under their new corporate name, to their own use, and then and there and thereby became and were liable to pay all the debts and liabilities of the first named railroad company, of which the claim of the plaintiff in that suit is one; that the plaintiff also averred that the consolidated company from that date directed and managed the defense wherein the said judgment was rendered, and that the act of consolidation and the aforesaid change of the corporate name of the company were approved by an act of the legislature of the state; that the consolidated company became and is liable to pay the judgment, interest and cost; that a copy of the judgment and proceedings mentioned in the declaration in that suit, as also copies of all the acts of the legislature therein referred to, were duly filed with said complaint as exhibits thereto; that the corporation defendants appeared to the action, and demurred to the complaint, and that the court sustained the demurrer and gave the plaintiff leave to amend.

But the record shows that the plaintiff in that case declined to amend his declaration, and that the court rendered judgment for the defendants. An appeal was prayed by the plaintiff, but it does not appear that the appeal, if it was allowed, was ever prosecuted, and the present defendants aver, in their plea in bar, that the matters and things set forth in the declaration in that case are the same matters and things as those set forth in the declaration in the present suit; that the plaintiff impleaded the defendants in that suit, in a court of competent jurisdiction, upon the same cause of action, disclosing the same ground of claim, and alleging the same facts to sustain the same, as are described and alleged in the present declaration; that the court had jurisdiction of the parties and of the subject-matter, and rendered a final judgment

upon the merits in favor of the defendants and against the plaintiff, and that the judgment remains unreversed and in full force.

Plaintiff demurred to the plea, and the defendants joined in the demurrer and the cause was continued. During the vacation the original plaintiff deceased, and it was ordered that the cause be revived in the name of the executrix of his last will and testament. Both parties subsequently appeared and were heard, and the court, consisting of the circuit and district judges, overruled the demurrer to the plea in bar, and decided that the plea is a good bar to the action.

Instead of amending the declaration pursuant to the leave granted, the plaintiff filed a replication to the plea in bar, to the effect following: that the decision of the county circuit court of the state was not a decision and judgment on the merits of the case, but, on the contrary thereof, the judgment of that court only decided that the complaint or declaration did not state facts sufficient to sustain the action, in this, that, according to the allegations of the complaint, the original Evansville & Illinois Railroad Company, on the taking place of the alleged consolidation as set forth in the complaint, ceased to exist as a separate corporation; and that the complaint did not state any matters of fact showing a revivor of the suit against the consolidated company or any facts which rendered such a revivor unnecessary; that the following allegations contained in the declaration in this case, and which were not contained in the complaint in the prior case, fully supply all the facts, for the want of which the demurrer was so sustained by the judge of the county circuit court, and in the defense of which he, the said judge, held that the suit had abated by the consolidation.

Matters omitted in the former declaration and supplied in the present, as alleged in the replication of the plaintiff, are the following: (1) That the two companies, on the 18th of November, 1852, by virtue of the act to incorporate the Wabash Railroad Company, consolidated their charters and united into one company under the name and style of the Evansville & Illinois Railroad Company; and that the consolidated company, under that name, continued to appear to and defend the said action in the said supreme court. (2) That the legislature of the state of Indiana subsequently enacted that the corporate name of the consolidated company should be changed and that the same should be called and known by the name of the Evansville & Crawfordsville Railroad Company, by which name the defendants have ever since been and now are known and called. (3) That the act of the legislature changing the name of the consolidated company was subsequently duly and fully accepted by the directors of the company, and that the company became and was liable for all acts done by the two companies and each of them. (4) That the consolidated company appeared and defended the same action in the supreme court of the state of New York by the name of the Evansville & Illinois Railroad Company, and continued to defend the same until final judgment was rendered in the case. (5) That it did not in any manner appear in the former suit that the act of the legislature changing the name of the consolidated company ever went into force by its acceptance, or that the consolidated company had thereby, and by the acceptance of said act, become liable for all acts done by the said two companies before the consolidation, as is provided in the second section of said legislative act. Wherefore the plaintiff says that the decision in that case was not in any manner a decision upon its merits, nor in any manner a bar to this action.

Responsive to the replication, the defendants filed a special demurrer, and showed the following causes: (1) That the reply is insufficient in law to enable the plaintiff to have and maintain her action. (2) That the reply does not state facts sufficient to constitute a defense to the defendants' plea. (3) That the reply does not state facts sufficient to constitute a good reply, nor to avoid the defendants' plea.

Hearing was had; and the court sustained the demurrer to the replication, and rendered judgment for the defendants; and the plaintiff sued out the present writ of error.

Questions of great importance are presented in the pleadings, all of which arise, in the first instance, from the demurrer of the defendants to the replication of the plaintiff. Leave to plead over by the plaintiff, after the testator's demurrer to the defendants' plea in bar, is not shown in the record; but, inasmuch as the replication of the plaintiff to the plea was filed without objection, the better opinion is that it is too late to object that the replication was filed without leave.

Technical estoppels, it is conceded, must be pleaded with great strictness; but when a former judgment is set up in bar of a pending action, or as having determined the entire merits of the controversy involved in the second suit, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading. Reasonable certainty is all that is required in such a case, whether the test is applied to the declaration, plea or replication, as the party whose pleading is drawn in question cannot anticipate what the response will be when he frames his pleading.

Cases undoubtedly arise where the record of the former suit does not show the precise point which was decided in the former suit, or does not show it with sufficient precision, and also where the party relying on the former recovery had no opportunity to plead it; but it is not necessary to consider those topics, as no such questions are presented in this case for decision. Aside from all such questions, and independent even of the form of the plea in bar, the plaintiff makes several objections to the theory of the defendants, that the former judgment set up in the plea is a conclusive answer to the cause of action alleged in the declaration.

*First.* They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents the same questions as those determined in the former suit.

*Secondly.* They also deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties for the same cause of action, except as to the precise point or points *actually* litigated and determined in the antecedent litigation.

*Thirdly.* They contend that the declaration in the former suit did not state facts sufficient to sustain the alleged cause of action, and that the present declaration fully supplies all the defects and deficiencies which existed in the said former declaration.

1. Much discussion of the first proposition is unnecessary, as it is clear that the parties in the present suit are the same as the parties in the former suit; and it cannot be successfully denied that the cause of action in the pending suit is identical with that which was in issue between the same parties in the

suit decided in the county circuit court. Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue; the rule in such a case being that where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties. *Outram v. Morewood*, 3 East, 358; *Greathead v. Bromley*, 7 Term, 452.

2. Except in special cases the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor's Ev., sec. 1513; *Henderson v. Henderson*, 3 Hare, 115; *Stafford v. Clark*, 2 Bing., 382; *Miller v. Covert*, 1 Wend., 487; *Bagot v. Williams*, 3 B. & C., 241; *Roberts v. Heine*, 27 Ala., 678.

Decided cases may be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the first judgment was rendered on demurrer; but it is settled law that it makes no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties, and that the admission, even if by way of demurrer to a pleading in which the facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury. *Bouchard v. Dias*, 3 Den., 244; *Perkins v. Moore*, 16 Ala., 17; *Robinson v. Howard*, 5 Cal., 428; *Aurora City v. West*, 7 Wall., 99; *Goodrich v. The City*, 5 id., 573; *Beloit v. Morgan*, 7 id., 107.

§ 710. *A judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is conclusive as to the matters confessed, and facts thus established can never afterwards be contested between the same parties or those in privity with them.*

From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is that facts thus established can never after be contested between the same parties or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. *Rex v. Kingston*, 20 State Trials, 588; *Hutchin v. Campbell*, 2 W. Bl., 831; *Clearwater v. Meredith*, 1 Wall., 43; *Gould on Plead.*, sec. 42; *Ricardo v. Garcias*, 12 Cl. & Fin., 400.



Support to those propositions is found everywhere; but it is equally well settled that if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action. *Aurora City v. West*, 7 Wall., 90; *Gilman v. Rives*, 10 Pet., 298; *Richardson v. Barton*, 24 How., 188.

Viewed in the light of that suggestion it becomes necessary to examine the third proposition submitted by the plaintiff, which is, that the demurrer to the declaration in the former suit was sustained because the declaration was materially defective, and that the present declaration fully supplies all such imperfections and defects.

Different forms of expression, it may be conceded, are used, in several instances, in the declaration in the last suit from those employed in the complaint exhibited in the former suit; but the substance and legal effect of the two pleadings, in the judgment of the court, are the same in all material respects. Even without any explanation it is so apparent that the first and second alleged differences in the two pleadings are unsubstantial, that the objections may be passed over without further remark. Nor is there any substantial merit in the third suggestion in that regard, when the same is properly understood.

3. It is to the effect that the legislative act changing the name of the consolidated companies was accepted by the directors; but the complaint in the former suit alleged that the consolidated companies adopted the name of the *Evansville & Crawfordsville Railroad Company*, and that they took possession of all the rights, credits and property of the two companies, and used and converted the same to their own use, in said corporate name; and that said company then and there and thereby became and were liable to pay all the debts and liabilities of the consolidated company, of which the claim of the plaintiff is one.

4. All that need be said in response to the fourth alleged difference is, that the plaintiff averred in the former suit that the defendants, from the consolidation to the rendition of the judgment, by their attorney, directed and managed the original suit wherein the judgment in question was rendered.

5. Finally, the complaint is that it did not appear in the record of the former suit that the act of the legislature changing the name of the consolidated company ever went into force by the acceptance of the same, or that the consolidated company ever became liable for the acts of the two companies done by those companies before the consolidation took place.

Sufficient has already been remarked to show that there is no merit in that objection, for the reason that it appears in the former complaint that the two companies, by virtue of the legislative act, became consolidated, and that the name assumed by the consolidated company was changed by an act of the legislature; that the consolidated company, by the new corporate name, took possession of all rights, credits, effects and property of the original consolidated company, and that they, under that corporate name, became liable to pay all the debts and liabilities of the prior consolidated company; and they subsequently, by their attorney, directed and managed the defense in the suit wherein the said judgment was rendered.

Tested by these considerations, it is clear that the proposition that the de-

facts, if any, in the declaration in the former suit were supplied by new allegations in the present suit, is not supported by a comparison of the two pleadings. Should it be suggested that the demurrer admits the proposition, the answer to the suggestion is, that the demurrer admits only the facts which are well pleaded; that it does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument. *Ford v. Peering*, 1 Ves. Jr., 78; *Lea v. Robeson*, 12 Gray, 280; *Redmond v. Dickerson*, 1 Stockt., 507; *Green v. Dodge*, 1 Ham., 80.

Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation. *Nesbitt v. Berridge*, 8 Law Times, N. S., 76; *Murray v. Clarendon*, Law Rep., 9 Eq., 11; *Story's Eq. Plead.*, 254b; *Ellis v. Coleman*, 25 Beav., 662; *Dillon v. Barnard*, 21 Wall., 430. Examined in the light of these authorities, it is clear that the construction of the declaration in the former suit, as well as in the present, is still open, and that there is no error in the record.

*Judgment affirmed.*

MR. JUSTICE BRADLEY dissented.

§ 711. In general.—A recovery once had in any court, whether state or federal, is a bar to the prosecution of the same cause of action in another court. *United States v. Dwyer*, 6 Biss., 501.

§ 712. A judgment in one action is *res judicata* in another when there is an identity of the things sued for; where there is an identity of the cause of action; where there is an identity of persons and of parties, and where there is an identity of character or quality of the parties for or against whom the claim is made. *Smith v. Turner*,\* 1 Hughes, 373.

§ 713. In order for one suit to constitute an estoppel upon any party to another suit, four conditions must co-exist, viz.: 1st. There must be an identity of the cause of action. 2d. There must be an identity of the parties to the suit. 3d. There must be an identity in the character or quality of the respective parties; and 4th. There must be an identity of the thing in question. Accordingly, where the facts and evidence in a trade-mark case were nearly identical with those of a former suit brought by the same plaintiff, but the complaint in the case charged that the use of the trade-mark by the defendant was a fraud upon the public, whereas the complaint in the former suit did not, such former suit was held to work an estoppel. *The Durham Smoking Tobacco Case*. *Blackwell & Co. v. Dibrell & Co.*, 3 Hughes, 151.

§ 714. The criterion by which to decide whether two suits are for the same cause of action is whether the evidence properly admissible in the one will support the other. *Steam Packet Co. v. Bradley*, 5 Cr. C. C., 393.

§ 715. The defense of *res judicata*, whether made in the form of a plea in bar, or offered as evidence on the general issue, must, to avail the party, be between the same parties, and the judgment must be shown to be on the same question or point that is sought to be litigated in the new action. It is not sufficient to show that it might have been on such question or point. *The Vincennes*, 21 Law Rep. (11 N. S.), 616; 3 Ware, 171.

§ 716. For a judgment to be a bar to a subsequent suit, it must appear upon the face of the pleadings that it was for the same subject-matter. It is not always enough that by inference, or *arguendo*, the same point must have been considered. *Greely v. Smith*,\* 1 Woodb. & M., 181.

§ 717. A judgment rendered on a note is a bar to a subsequent action on the note. *Eldred v. Bank*, 17 Wall., 545.

§ 718. A judgment construing a contract is *res judicata* between the parties in subsequent suits involving the construction of the same contract. *Tioga R. R. Co. v. Blossburg, etc.*, R. R. Co., 20 Wall., 58.

§ 719. The record of a judgment for the same cause can only be received in evidence to bar the plaintiff's action or to show that certain proceedings under it have operated to change the right of property. *Matthews v. Menedger*, 2 McL., 145.

§ 720. When a question is distinctly put in issue, tried and decided, the judgment operates as an estoppel as to that question in any subsequent suit between the same parties, on the same or a different cause of action. (Cases cited.) *Radford v. Folsom*,\* 3 Fed. R., 199.

§ 721. A record of a former judgment between the same parties, upon the same cause of action, may be given in evidence on *non-assumpsit*. *Ridgway v. Ghequier*, 1 Cr. C. C., 87.

§ 722. A former recovery may be given in evidence upon *nil debet*. *Welsh v. Lindo*, 1 Cr. C. C., 508.

§ 723. A former recovery upon a count for goods sold and delivered may be given in evidence in an action of debt upon a promissory note, with evidence that judgment was confessed in the former action upon and for the note now declared upon. *Ibid*.

§ 724. Where a court of general jurisdiction in another sovereignty has decided the question of its own jurisdiction, expressly raised by plea, the parties are bound in the home court by such decision as *res judicata*. Thus in a suit in a home court against an insurance company on a judgment rendered by a court of another sovereignty, the process in the foreign court having been served upon the agent of the company, and peremptory exception having been taken thereto by the company, the home court, after a thorough investigation, being of opinion that the question of jurisdiction was fairly submitted to the foreign court, and passed upon by that court, held that the parties were bound by the judgment of that court as *res judicata*. *Moch v. Insurance Co.*, 4 Hughes, 61.

§ 725. Where a bill is brought in equity to enforce a judgment obtained in an action at law, the plea of *res adjudicata* cannot be successfully interposed. *First Nat. Bank v. Bohne*, 8 Fed. R., 116.

§ 726. Parties or privies.—A matter which has been directly tried and decided by a court of competent jurisdiction cannot be again contested between the same parties or privies in the same or any other court; and in this there is no difference between a judgment in a court of common law and a decree in a court of equity; but no rights will be affected by a recovery except those of the actual defendants, and those claiming through them, and purchasers *pendente lite*. *Society for the Propagation of the Gospel v. Town of Hartland*, 2 Paine, 536.

§ 727. Judgments and decrees, in order to be conclusive evidence of facts, or evidence at all in other proceedings, must be between the same parties or privies to them, and are estoppels only in such cases as may arise between those very parties or those claiming under them. *Day v. Combination Rubber Co.*, 2 Fed. R., 570.

§ 728. The validity of wills of real estate is solely cognizable by courts of common law, and the verdict and judgment thereon are conclusive only as between the parties to the suit and their privies. *Tompkins v. Tompkins*, 1 Story, 547.

§ 729. An action on a note brought by a bank in the name of a payee, but for its benefit, is a bar to a suit on the note by the bank in its own name. *York Bank v. Asbury*, 1 Biss., 230.

§ 730. In a suit in chancery, where necessary parties are made defendants because they refuse to join as plaintiffs, adverse interests between the co-defendants may be passed upon and decided; and if the parties have had a hearing and an opportunity to assert their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. *Corcoran v. Chesapeake & Ohio Canal Co.*,\* 4 Otto, 741.

§ 731. A bill was filed to foreclose a mortgage given to secure certain notes. The answer set up a want of consideration, but on final hearing the defense was overruled and a sale decreed. The present action is brought by plaintiffs, who, with a third party, had been complainants in the foreclosure suit, as indorsees of the aforesaid notes; the same want of consideration is alleged as a defense. *Held*, that the question was *res adjudicata*, and none the less binding because parties to the foreclosure suit, not joined in the present action, were concluded by it. *Thompson v. Roberts*,\* 24 How., 233.

§ 732. A *cestui que trust* is bound equally with his trustee by a decree in equity against the latter, in the matter of the trust for which he was appointed. Hence where a party brought suit in his capacity as trustee on certain bonds and coupons, and subsequently attempted to test the same matter individually, he was held concluded by the decree in the former suit; for if he owned any of the bonds and coupons then, he was also representing himself; if he acquired them after the decree, he was bound as privy to the person who was represented. *Corcoran v. Chesapeake & Ohio Canal Co.*,\* 4 Otto, 741.

§ 733. A party is not concluded by an adjudication unless he has all the ordinary rights of a litigant with respect to the adjudication. But a party contributing money for the purpose of employing counsel, and carrying on a litigation, under a contract with a party to the record, must of necessity be held to have the right to take such action in the case as will protect his own interest in it. *Miller v. Liggett & Myers Tobacco Co.*,\* 2 McC., 375.

§ 734. A judgment upon a motion in favor of a purchaser at a judicial sale in Louisiana is *res adjudicata*, and a bar to a suit by any one claiming under the judgment debtor. Thus, judgment was rendered in favor of the plaintiff in a foreclosure suit, which on a devolutive appeal was affirmed by the upper court. During the pendency of the appeal the lands were sold and the plaintiff (or mortgagee) became purchaser. He thereupon applied for a motion to protect his title thus acquired, as he was authorized to do under the Revised Statutes of Louisiana. Publication being duly made, the proceedings upon the motion terminated in favor of the mortgagee, and the sale was confirmed. The widow of the mortgagor,

as tutrix of the present plaintiff, minor heir of the mortgagor, in endeavoring, seven years afterwards, to have the title acquired under the monition annulled, was held to be precluded from maintaining her suit. *Montgomery v. Samory*, \* 9 Otto, 482.

§ 735. Where a suit was brought in the state circuit court of Oregon to enforce a mortgage lien, and a decree was rendered directing the mortgaged premises to be sold to satisfy such lien, held, that both the validity of the note and mortgage upon which the suit was brought, and the capacity of the plaintiff to sue thereupon, were fully determined by such decree, and became *res adjudicata* as to all the parties to the suit and their privies. *Semple v. Bank of British Columbia*, 5 Saw., 88.

§ 736. Where the trustees in a mortgage given by a railroad company to secure the payment of its bonds are joined as defendants in a suit to foreclose the mortgage, the decree is binding on bondholders not made parties, provided the complainants have proceeded in good faith; and such bondholders cannot commence an independent suit to foreclose the same mortgage after such a decree. *Campbell v. The Railroad Co.*, 1 Woods, 368.

§ 737. A verdict and judgment that the mother was born free is not conclusive evidence of the freedom of her children, unless between the same parties or privies. *Wood v. Davis*, 7 Cr., 273.

§ 738. Decision of particular question.—A fact tried and decided by a court of competent jurisdiction cannot be contested again between the same parties; and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity. *Bank of United States v. Beverly*, 1 How., 184.

§ 739. In an action to recover damages for the infringement of a patent, the novelty and originality of the invention were put in issue and litigated, but the plaintiff recovered. In a subsequent suit between the same parties to recover for an infringement of the same patent, it was held that the judgment in the first action was conclusive as to the novelty of the invention, and that it could not be attacked in the second suit. *Dubois v. Philadelphia, Wilmington & Baltimore R. Co.*, \* 5 Fish. Pat. Cas., 208.

§ 740. In order to create an estoppel by former judgment the point in question must either have been admitted on the record or an issue must have been made on it and decided against the party against whom it is offered in evidence: but parol evidence is inadmissible to establish such estoppel. *Putnam v. New Albany*, 4 Biss., 365.

§ 741. In suit brought on a note secured by assignment, the fact that the plaintiffs had been made nominal parties defendant to a former suit against the trustee because secured by the assignment, held to be no valid plea of *res adjudicata*, the record showing that no question was raised in the former suit as to the claim preferred by the plaintiffs on the note, it being further apparent that if so raised it could not have been adjudicated. *Clark v. Gibboney*, 3 Hughes, 891.

§ 742. — *wrongful act*.—A decree in a former suit between the same parties as to the same subject-matter will be held to be *res adjudicata* as to all questions which were or might have been decided in such former suit, unless the successful party in some way prevented his adversary by some wrongful act from fully presenting his case. *Brooks v. O'Hara*, 2 McC., 644.

§ 743. Joint judgments—Several judgments.—A several suit and judgment against one of two joint makers of a promissory note is no bar to a joint action against both on the same note. *Sheehy v. Mandeville*, 6 Cr., 253.

§ 744. When a judgment is obtained against one of two partners on a joint promise, the contract is merged in the judgment, and an action at law cannot be maintained against the partners on the same ground. *Sedam v. Williams*, 4 McL., 51.

§ 745. A judgment against one joint trespasser, without any subsequent satisfaction thereof, is no bar to the recovery of another judgment against another joint trespasser for the same grievances. *Collard v. Delaware, Lackawana & Western R. Co.*, 6 Fed. R., 246.

§ 746. A judgment against one of several wrong-doers, unless fully satisfied, is not a bar to an action by the judgment creditors against the others. *Lovejoy v. Murray*, 3 Wall., 1.

§ 747. A judgment against one of several joint trespassers is no bar to an action against another individual for the same trespass. *Matthews v. Menedger*, 2 McL., 145.

§ 748. *Semble*, that a joint judgment is no bar at law to a separate suit against one of the obligors on a joint and several bond, or against his personal representatives. The joint judgment only bars the joint remedy in such case, and not the several remedy. *United States v. Cushman*, 2 Sumn., 426.

§ 749. Persons not parties.—A decree is binding and conclusive with respect to the subject-matter on which it acts, but does not affect the rights of third persons who were not parties to the cause in which the decree was rendered. *McCall v. Harrison*, 1 Marsh., 126.

§ 750. The judgment of an inferior court, when affirmed on appeal, is only conclusive between the parties and their privies upon the matters involved. It acquires no additional valid-

ity from affirmance. It does not conclude third parties not before the court, or in any way affect their rights. *In re Howard*, 9 Wall., 175.

§ 751. The United States circuit court refused to admit in evidence a verdict and judgment given in the supreme court of Pennsylvania, offered apparently for the purpose of proving boundary, because the case was between different persons and upon a different question. *James v. Stookey*, 1 Wash., 330.

§ 752. Judgment of foreclosure was recovered by the executrix of the mortgagee, in 1826, in a suit against the original mortgagor. Long before this judgment, viz., in 1819, the mortgagor had assigned all his title to redeem the premises to two other persons, under whom the plaintiffs derived their title. *Held*, that this judgment can operate as a bar or estoppel only between the particular parties to it and their privies, and is *res inter alios acta* and inoperative, as regards the plaintiffs, and that the possession under it is not subversive of their right to redeem. *Gordon v. Hobart*, 2 Sumn., 401.

§ 753. A judgment creditor, in a suit brought by him to remove clouds from property affected by the lien of his judgment, is not estopped by a judgment, relating to the same property, obtained in a suit between two defendants, to which he was not a party. *Scottish American Mortgage Co. v. Follansbee*, 9 Biss., 483.

§ 754. In an action of trover for a brig the defendant pleaded in bar of the action that the plaintiff had prosecuted a third person in a writ of replevin for the same brig, and the property therein had been adjudged not to be in the plaintiff. The plea was held bad because the parties in the two suits were not the same. *Greely v. Smith*,\* 1 Woodb. & M., 181.

§ 755. Where in an action of replevin the maker of a negotiable note, on the ground that it had been fraudulently procured, obtained judgment for its recovery against E., an agent in whose hands it had been placed for collection by the indorsee for value before maturity, the suit being defended by the original payee, the indorsee not having been made a party, *held*, that the judgment in the replevin suit did not bar the owner of the note from bringing an action against the maker for the recovery of the amount thereof; that the action of replevin is not one *in rem*, and to give jurisdiction over the person he must be a party. *Waite v. Triplecock*, 5 Dill., 547.

§ 756. The decision of a state court in which suit was brought against an indorser, being that the plaintiff could not recover on account of equities existing between the parties by reason of the note having been taken as security for a precedent debt, *held*, that such judgment was not a bar to a subsequent suit against the maker. *The National Bank of the Republic v. The Brooklyn City and Newtown R. Co.*, 14 Blatch., 242.

§ 757. A decision that a tax sale, the validity of which is not contested, carried the whole title free from incumbrances, is not conclusive as to the validity of the tax sale, where a suit to contest it is brought by a person not a party to the former suit. *Smith v. Turner*,\* 1 Hughes, 378.

§ 758. A judgment and execution by the plaintiff against the drawer of a bill is no bar to a judgment against the indorser, although that execution be levied on the drawer's goods, which are not sold for want of buyers. *Hodgson v. Turner*, 1 Cr. C. C., 74.

§ 759. Judgment in trespass against a sheriff for attaching the goods of the plaintiff in an action against others, unless such judgment is satisfied, is no bar to an action against the attaching creditors, but amounts received from such sheriff will go to mitigate damages in an action against them. *Murray v. Lovejoy*, 2 Cliff., 191.

§ 760. C., being indebted to W., gave his note for the amount, and W. assigned the note to M., and afterwards left the country. R., a creditor of W., attached the effects of W. in the hands of C. C. had notice of the assignment of his note to M. A decree was rendered in favor of R. M. subsequently brought suit upon the note against C., but the decree was satisfied before service of the process in the second suit. C. pleaded the decree in favor of R. in bar of M.'s right of action and M. demurred. The court sustained the demurrer on the ground that a decree rendered in a suit between two parties is not admissible as evidence in a suit between one of those parties and a third party. *Maukin v. Chandler*, 2 Marsh., 125.

§ 761. G. applied for administration on the estate of his father. It was resisted on the ground that G.'s mother and the deceased were never married. The orphans' court directed that the question whether there was a valid marriage should be tried, and on a verdict in the negative rendered judgment against G. *Held*, that that judgment, though conclusive as to the legitimacy of G., was not conclusive on his sisters, who were not parties to the proceeding. *Kearney v. Denn*, 15 Wall., 51.

§ 762. A decision upon the application of several claimants to be preferred in the distribution of the proceeds of persons of color found on board a vessel condemned for violation of the slave trade act does not bar the assertion of an adverse claim by a third party whose right was not passed upon in such decision, though the question might have been settled if it had been raised. *United States v. Preston*,\* 3 Pet., 57.

§ 763. Where a decree in a state court fixed the liability of a defaulting officer and his sureties, and ascertained that two creditors, who had been made parties defendant, were entitled to recover each a specified sum from the officer and his sureties, but the creditors died before the rendering of the decree, and by negligence the suit was not revived against the representatives of the creditors, and suit was afterwards brought in a federal court by the representatives of one of the creditors, who were non-residents, *held*, that although the representatives, not having been made parties, might have gone into the state court and disputed the decree, the sheriff and his sureties were bound by it, but that the representatives of the creditors could accept it or not at their election. *Howards v. Selden*, 4 Hughes, 300.

§ 764. A judgment against a patentee on a *sci. fa.* issued to obtain a repeal of a patent vacates the same; but a judgment in his favor will not prevent his right being contested in a suit he may subsequently institute for its violation. *Delano v. Scott*, Gilp., 489.

§ 765. Where the validity of a tax sale is not contested, and the judgment merely declares the effect of the sale to be to vest the title in the purchaser, one not a party to the record is not estopped from contesting the validity of such sale. *Smith v. Turner*,\* 1 Hughes, 376.

§ 766. — *decision entitled to weight.*— Where questions of fact as to the location of a grant of land had been determined by a district judge, and the finding had been reviewed and affirmed on appeal by the circuit justice, *held*, that in a suit against other defendants upon the same evidence and the same issue of fact, the finding in the former case, upon exactly the same state of circumstances, although not *res adjudicata* as to the defendants, was authority, and entitled to great weight as such. *Dodge v. Perez*, 2 Saw., 645.

§ 767. Notification.— A judgment is not conclusive of the rights of a person who was not a party to the action in which it was rendered and was not notified of its pendency, and who had no opportunity or right to controvert the claim on which suit was brought, or control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. *Hale v. Finch*, 14 Otto, 261.

§ 768. A judgment in an action by the holder of a promissory note against an indorser is not conclusive in an action by the holder against the maker when the latter had no notice of the first action. *Railroad Co. v. National Bank*, 12 Otto, 14.

§ 769. A person by whose negligence a municipal corporation is compelled to pay damages for an injury sustained in consequence of a defect in the street, is, in an action by the corporation against him to recover the amount of such damages, concluded by the judgment recovered against the corporation for such injury, where he knows of the injury and the pendency of the action, though not a party, and though he has nothing to do with defending the suit. *Robbins v. Chicago*, 4 Wall., 657; *City of Chicago v. Robbins*, 2 Black, 418.

§ 770. The record of a suit previously brought on the same letters patent against a defendant to whom the infringing machines had been furnished by the defendant herein, the expense of the defense in said suit having been paid by the latter, is competent evidence for the plaintiff in a like action against the latter for infringement, and is also conclusive upon the question of priority or novelty of the patent. *U. S. and Foreign Salamander Felting Co. v. The Asbestos Felting Co.*, 18 Blatch., 310.

§ 771. *Same subject-matter.*— A judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made by a court of competent jurisdiction upon the same subject-matter, between the same parties, and for the same purpose. *Aspden v. Nixon*, 4 How., 467.

§ 772. The decision of a court of competent jurisdiction, directly upon the same point, is conclusive whenever it may again come in question. *Wright v. Deklyne*, Pet. C. C., 199.

§ 773. When a former judgment is relied on as a defense, whether presented as a plea in bar or as evidence only, it must appear from the record itself that the very question which is the subject of litigation in the new action actually was decided in the former action, and not that it might have been. *The Vincennes*, 8 Ware, 171.

§ 774. Where a party brings an action for a part only of an entire indivisible demand; and recovers judgment, he cannot subsequently maintain an action for another part of the same demand. *Baird v. United States*, 6 Otto, 430.

§ 775. The facts set up in a bill in equity being merely an amplification of the allegations contained in a petition in a former suit, whereon a judgment was had, but the *gravamen* of the bill being identical with that of the petition, the plea of *res adjudicata* was good, and concluded the complainant. *Price v. Dewey*,\* 6 Saw., 493; 11 Fed. R., 104.

§ 776. The sentence or decree of a court of exclusive jurisdiction, operating directly on the thing itself, is conclusive between the same parties, upon the same matter coming directly or incidentally in question, in another court of co-ordinate jurisdiction, not only of the right which it establishes, but of the fact which it directly decides. *Armroyd v. Williams*,\* 2 Wash., 510.

§ 777. This doctrine applies to the decisions of courts of admiralty, whether foreign or domestic. *Ibid.*

§ 778. The party complainant in this suit filed his bill to enforce the payment of certain interest coupons then due and unpaid for many years, which, together with the bonds whereof they were a part, had been issued by the defendant corporation, and secured by way of a mortgage of the revenues and tolls of a canal, after certain necessary expenses were deducted therefrom, and the interest thereon. Defendant's answer developed that, in a prior suit brought by the state of Virginia, seeking the same end, said party complainant had been joined as a defendant; and that in such prior suit it was decided by the Maryland court of appeals, that while in general an interest coupon, capable of detachment from the main instrument, bore interest, if unpaid, after maturity, yet that under a special statute of Maryland authorizing the pledge by defendant corporation of its revenues for the payment of these preferred bonds and interest, and waiving her own existing priority of claim on those revenues, simple interest only was meant, and a decree in conformity with this opinion was subsequently passed by the circuit court of Baltimore city. The matter being thus *res adjudicata*, the court held that under the statutory rule the prior decision was final and conclusive between the parties. *Corcoran v. Chesapeake & Ohio Canal Co.*, \* 4 Otto, 741.

§ 779. Different subject-matter.—A former judgment is no bar to an action for services which in the former suit were decided to be outside of the contract on which that suit was brought. *Goddard v. Foster*, 17 Wall., 123.

§ 780. Where the land in controversy was a different subject-matter from that litigated in a previous action, although the various chains of title were the same in both cases, *held*, the former decree was no bar to the present action. *Starr v. Stark*, \* 2 Saw., 641.

§ 781. In an action brought to recover a year's rent, the court found that only a part of the rent was due, and rendered judgment for that part alone. *Held*, that the judgment was not a bar to a suit brought subsequently to the expiration of the year to recover the balance of rent not included in the judgment. *Bath v. Lindenmyer*, \* 1 Wyom. Ty, 240.

§ 782. The creditor of a person deceased presented a claim against his estate for a part of the proceeds of a life insurance policy which the deceased had promised to assign to him. The claim was rejected on the ground that there having been no delivery there was no pledge. *Held*, that such decree was not a bar to a suit for a specific performance of the contract to deliver the pledge, and for a decree that his debt be satisfied out of the proceeds of the policy. *Myers v. D'Meza*, 2 Woods, 160.

§ 783. The fact that the petition of stockholders to be made parties to a foreclosure suit against their corporation was denied is no bar to an independent suit by such stockholders to set aside the decree for fraud. *County of Tazewell v. Farmers' Loan and Trust Co.*, 12 Fed. R., 752.

§ 784. Where a bond with sureties was given by H. to the government, for the faithful performance of his duties as collector of customs, and subsequently an additional bond, with a different surety, but with a like penalty and condition, was given by H., and a judgment perfected against him on the latter bond, *held*, in a joint action against the obligors in the former bond, that a plea setting up the judgment and averring that in the two actions the plaintiff sought to recover the identical sum of money, and upon the same identical breaches of each bond, was not a good plea. *United States v. Hoyt*, 1 Blatch, 326.

§ 785. In Virginia a judgment was rendered against the plaintiff in an action on a promissory note, given in payment for a quantity of fish, on technical grounds. *Held*, that this was no bar to a subsequent action on the original contract between the same parties. *Clark v. Young*, 1 Cr., 181.

§ 786. A judgment of a state court, that the debt had been extinguished, given in an action which was not brought for the recovery of the debt, and which action, moreover, had been discontinued by the plaintiff, cannot be set up in bar of proceedings in the United States circuit court for the recovery of the debt, which proceedings had been commenced when the judgment in the state court was given. *Shelton v. Tiffin*, 6 How., 163.

§ 787. A judgment against a bank, in a suit upon the teller's bond, is not a bar to an action for money had and received by him for the use of the bank. *Bank of United States v. Johnson*, 3 Cr. C. C., 228.

§ 788. It is no bar to a writ of right that there has been a judgment on a petition for partition between the same parties, in favor of the tenant, upon an issue joined therein on the sole seizin of the defendant. *Mallett v. Foxcroft*, 1 Story, 474.

§ 789. Under the law of Louisiana the authority of a thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be made between the same parties, and founded by them against each other in the same quality. So a judgment against a person claiming a part of certain property as the heir of her mother and the forced

heir of her father, against his executors under a will, is not a bar to a suit by the same person upon another will subsequently established, against another person, to establish her claim to the whole property of her father. *Gaines v. Hennen*, 24 How., 553.

§ 790. In an action against a disbursing officer of the government to recover a balance due from him, the defendant discovered an error in his favor. At the instance of the court this was not allowed as a set-off, but was reserved for future examination by the accounting officers. *Held*, that the matter was not the subject of judicial investigation to such an extent that the judgment in that action was a bar to the claim, by the defendant therein, of that sum. *White v. United States*,\* Dev., 17.

§ 791. A bill in chancery was filed to determine an adverse claim of title, and the complainant, upon alleging two grounds of relief, was required to elect between the two, the two grounds of action being inconsistent. A decree was rendered in complainant's favor, but was reversed by the supreme court of the United States. Whereupon the complainant filed a second bill, alleging the other ground of relief which in the former suit had been withdrawn in obedience to the order of the court. *Held*, that the first decree was no bar as *res judicata*. *Starr v. Stark*, 2 Saw., 603.

§ 792. A matter can only be *res judicata* between parties and their privies. A state is neither party nor privy to suits against its officers. Accordingly, where suit was brought against S. in his individual capacity to recover lands held by him in his capacity as state officer, and title in the state was set up as a defense, and the attorney-general acted as attorney for the defense, without using his official designation in signing the pleadings, upon judgment for the plaintiff, *held*, in a subsequent suit, by the grantees of plaintiff, against the governor and the successor in office of the defendant in the former suit to recover the same property, that the state was not bound by the judgment in such former suit nor its title affected thereby. *Adams v. Bradley*, 5 Saw., 217.

§ 793. In a suit for the rescission of a contract the judgment in favor of defendants' agents, in an action of deceit for inducing plaintiff to purchase property from defendants, is no bar, if there is a fact which must have been established in the former suit to authorize the verdict and judgment, which the complainant is not obliged to prove to entitle him to a decree for rescission, or if such decree may pass upon proof of any of the allegations of the bill not necessarily determined against the complainant in the former suit. Thus, where, in suit against agent for deceit, and in suit against the principal for rescission, the allegations in each case being substantially that the board of directors of the plaintiff company were virtually stockholders of the defendant company, inasmuch as the jury in the former suit must have found fraud on the part of the defendant to justify verdict for the plaintiff, whereas in the suit for rescission no fraud need be shown, *held*, that the judgment in favor of defendant in former suit was no bar to suit for rescission. *Emma, etc., Co. v. Emma, etc., Co.*, 7 Fed. R., 401.

§ 794. The judgment of a court in a suit to foreclose a mortgage is not *res adjudicata* in bar of a proceeding by the defendant in such suit to rescind the contract and set aside the conveyance, although the same matters be brought forward in the suit to rescind as in the foreclosure suit, unless such matters were properly available as a defense in that suit. In which case the judgment is a bar, although the defense was not allowed. But if the subject-matter of the rescission suit was not admissible as a defense to the foreclosure, for the reason that it involved the rights of other parties, strangers to the mortgage, or property other than that covered by the mortgage, which must have been affected by any decree based upon the defense then urged, in that case it would be no bar. *Oliver v. Cunningham*, 7 Fed. R., 659.

§ 795. Judgment at law — Equitable relief. — A verdict and judgment at law is no bar to relief in equity, if an equitable ground of relief be laid, and that is not denied by the pleas. If it be denied, the plaintiff may reply generally, and go into proofs to support the bill; and if he fail to make his proof the plea will be a good bar, as if no replication had been put in. *Gallagher v. Roberts*, 1 Wash., 320.

§ 796. Merger. — A plea that a claim has been merged in a judgment which has been satisfied is good against a prayer for an injunction against such demand, but will not avail against proceedings for rescission of a contract by which that demand was created. Accordingly, where complainant brought suit for rescission of sale, and also prayed for an injunction against the collection of moneys advanced by P., the defendant, and the plea of the defendant set forth that a judgment in a suit at law had been recovered upon the identical claim for such moneys, and that the judgment had been satisfied by sale on execution against property of complainant, the plea was sustained, as it showed that this claim for money advanced had been merged in a judgment which had been satisfied; but the court ruled that upon rescission of the sale full account would be taken of all the dealings in regard to the subject of the sale, and the moneys advanced, notwithstanding the former judgment and satisfaction, the property acquired by P. by such judgment being subject to the equities existing between the parties. *Emma, etc., Co. v. Emma, etc., Co.*, 7 Fed. R., 401.



§ 797. A judgment or decree establishes, in the most conclusive manner, the sum due upon the claim sued upon. The cause of action is merged in the judgment and can never again become the basis of any claim against the defendant in the judgment. *Ries v. Rowland*, 11 Fed. R., 657.

§ 798. A judgment obtained against A., in a suit against him and two other defendants, merges the instrument on which the action was founded; and such judgment may be pleaded in bar to an action on the instrument against one or all of the defendants. *Woodworth v. Spaffords*, 2 McL., 168.

§ 799. Different defenses.—In an action against the indorsers of a series of promissory notes, given as a part of one transaction, upon two of such notes, the defendants failed to set up a written agreement that they should not be liable on their indorsement, but defended on other grounds, and judgment was rendered against them. *Held*, that they were not estopped by such judgment to set up such agreement in an action against them on other notes of the same series. *Davis v. Brown*, 4 Otto, 423.

§ 800. Different grounds of action—Election.—Where two distinct grounds of relief are set up in an action, and the court compels the plaintiff to elect on which he will proceed, and judgment is rendered against him on the one which he thus chooses, such judgment is not a bar to a subsequent action founded on the other cause of action. *Stark v. Starr*, 4 Otto, 477.

§ 801. A bill in equity was filed by A. and B. against C., claiming certain property and setting forth the basis of their claim; in an amended bill, they also claimed title upon other grounds. Being required by the court to elect, they rested entirely upon the second ground. The bill was subsequently dismissed by decree of the supreme court. A., succeeding to the rights of B., brought suit to have C. enjoined from enforcing a judgment recovered at law by him, for possession of the premises, and to have himself, A., adjudged owner of the premises and compel C. to release his title thereto, on the ground abandoned in the former suit. *Held*, that the principle of *res adjudicata* applied, and that the former suit was a bar to the present action. *Starr v. Stark*,\* 1 Saw., 270.

§ 802. Choice of remedies.—Where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruits of his judgment, he cannot afterward proceed in another suit for the same cause of action. *Kendall v. Stokes*, 3 How., 87.

§ 803. Nonsuit.—A judgment by nonsuit is no bar to a new suit upon the same cause of action, nor does it estop or conclude the plaintiff as to the facts alleged in both actions as the ground or cause of action. *Emma, etc., Co. v. Emma, etc., Co.*, 7 Fed. R., 401; *Evans v. White, Hemp.*, 296.

§ 804. A judgment by nonsuit does not bar a new action unless it is by order of court under a decision upon the merits; and it seems doubtful whether it is then a bar. *Greely v. Smith*,\* 1 Woodb. & M., 181.

§ 805. A nonsuit not the result of a judgment of the court is no bar to a subsequent libel for the same cause of complaint. *Jay v. Almy*, 1 Woodb. & M., 262.

§ 806. A suit by attachment was brought against a defunct banking corporation on an amount of bank notes. Assignees of the bank intervened and set up title to the property attached. Judgment was adverse to the intervenors, and it was decreed that "their demand be rejected with costs." The intervenors then instituted the present suit against the same parties upon the supposition that the former decree was merely equivalent to a nonsuit. *Held*, that the intervenors were concluded by the prior decree. *Ingraham v. Dawson*,\* 20 How., 486.

§ 807. A judgment of non pros., given by a state court in a case between the same parties, for the same property, was not a sufficient plea in bar to prevent a recovery under a writ of right. *Homer v. Brown*, 16 How., 354.

§ 808. Dismissal.—The dismissal of a suit agreed is not a judgment, and is no bar to a future suit for the same cause. *Hoffman v. Porter*, 2 Marsh., 156.

§ 809. A dismissal of a bill, not on the merits, is no bar to another bill for the same cause. *Grubb v. Clayton*,\* 2 Hayw. (N. C.), 378; *Jenkins v. Eldredge*, 3 Story, 181.

§ 810. Where a libel is dismissed in one of the United States courts for want of prosecution, such dismissal is not a bar of a subsequent proceeding for the same cause of action in another state. *Sarchet v. The Sloop Davis, Crabbe*, 185.

§ 811. When a bill is dismissed without prejudice, the complainant can bring a new bill against different parties on the same claim, or against the same parties on new or additional facts, the dismissal of the former bill not being in such case *res adjudicata*. *Kimball v. Mobile*, 3 Woods, 555.

§ 812. Where a bill is dismissed with costs for non-appearance of the plaintiff, such dismissal is not conclusive in favor of the defendant, and is no bar to another suit brought for the same relief. *American Diamond Rock-Boring Co. v. Sheldon*, 17 Blatch., 208.

§ 813. A suit by one patentee against another patentee of a similar machine, founded on the interference of the invention of the latter with that of the former, and asking that the

latter patent be declared void, was dismissed after a hearing on the merits. The judgment being of dismissal simply, and not importing that the plaintiff's patent was void and inoperative, was held not to be a bar to a suit by the same plaintiff against a purchaser of a part of such second patent who had acquired his interest pending the first suit. *Tyler v. Hyde*, 2 Blatch., 308.

§ 814. Where a suit is dismissed without prejudice the decree does not operate as a bar to another suit on the same claim, if the complainants can, in such other suit, obviate the defects in the bill dismissed. *County of Mobile v. Kimball*, 12 Otto, 691.

§ 815. A former trial and verdict on the same matter and between the same parties is not a bar to the subsequent trial, when no judgment was ever rendered on that verdict, the bill having been dismissed on the plaintiff's own motion. *Allen v. Blunt*, 2 Woodb. & M., 121.

§ 816. In order that a judgment may constitute a bar to another suit it must be rendered between the same parties or their privies, and the point of controversy must be the same in both cases and must be determined on its merits. If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will be no bar to another suit. *Hughes v. United States*, 4 Wall., 232.

§ 817. A decree of dismissal of a bill in chancery is not conclusive against the complainant, in a court of law, although the bill may have been brought for the same matter as the action at law. *Wright v. Deklyne*, Pet. C. C., 199.

§ 818. A decree dismissing a bill in chancery, generally, may be set up in bar of a second bill; but where the bill has been dismissed on the ground that the court had no jurisdiction, which shows that the merits were not heard, the dismissal is not a bar to a second bill. *Walden v. Bodley*, 14 Pet., 156.

§ 819. A judgment of dismissal of a bill, in order to be a bar of a second suit, must have been ordered upon a hearing of the parties, or on the merits of the cause. *Sarchet v. The Sloop Davis*, Crabbe, 185.

§ 820. Where a bill has been dismissed upon its merits, and a second bill varying only in immaterial points from the first has been filed, the decree in the first bill furnishes a good plea in bar to the second. Thus, where a bill sought to follow funds of a bank as trust funds, but was dismissed on the ground that it was impossible to identify the property purchased with the trust money, a new bill for the same purpose, and the same as the first, excepting a new allegation that the complainant had reduced his claim against the bank's officers for the misappropriated funds to judgment, was held to be barred by the first decree. *Case v. New Orleans, etc.*, R. Co., 2 Woods, 236.

§ 821. A recovered judgment against B. on a note indorsed by him. At the same time he brought suit in another state, against C., a prior indorser on the same note, got judgment, and took C. in execution under a *ca. sa.*, but released him on receiving securities, which, however, did not satisfy any part of the debt. B. sought to enjoin A.'s judgment against him, proving the discharge of C. out of execution, but the court decreed that the judgment had not been satisfied and dismissed the bill. Having paid the money on the judgment, B. brought an action at law to recover it back, on the ground that the discharge of C. out of execution was a satisfaction of the debt, and also that the securities assigned by C. to A. should be considered as a satisfaction, though afterwards given up. *Held*, that the decree dismissing B.'s bill was conclusive, and a bar to his action at law. *Montford v. Hunt*, \* 3 Wash., 28.

§ 822. Question which might have been raised.—Where a suit is tried and determined between parties, the fact that a question might have been raised, tried and determined does not prevent the raising of such question in a suit on a different cause of action. Hence, where A., after instituting proceedings to obtain possession of, and quiet his title to, certain lands, conveyed a part of them to B., who was thereupon made a party plaintiff; and subsequently A.'s assignee in bankruptcy was substituted as a plaintiff in A.'s stead, the decree thereon rendered was no estoppel to a suit by said assignee in bankruptcy, seeking to set aside the conveyance from A. to B. *Radford v. Folsom*, \* 3 Fed. R., 199.

§ 823. The judgment on an issue made in a case and decided, with or without trial, is conclusive between the same parties in any subsequent action for the same cause as to all questions which were or might have been raised upon the first trial. (Cases cited.) *Ibid*.

§ 824. — scope of pleadings.—Where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as being *res judicata*, and the former adjudication is conclusive between the parties. *Aurora City v. West*, 7 Wall., 82.

§ 825. Judgment for defendant.—Where, under the statute of Nevada authorizing a defendant to set up as many defenses as he has, there are defenses in abatement, and on the merits, and the issues as to both are found for the defendant, but the judgment is to all appearances entered upon the merits; or if in such case there is merely a general judgment for the defend-

ant, without any limitation, such as "without prejudice," it will be held conclusive on the merits and *res adjudicata*. 420 Mining Co. v. Bullion Mining Co., 8 Saw., 634.

§ 826. A judgment in a state court having been rendered for the defendant generally, it must be supposed to cover the whole case, and not to have rested only on a branch of it, viz., a release which was pleaded by the defendant. Hence, where a bill was filed in the United States court by the same petitioners against the same defendant, it was correct for that court to consider the question as *res adjudicata*. Fourniquet v. Perkins, 7 How., 160.

§ 827. New evidence.—The fact that a plaintiff has, since a former trial, and judgment thereon adverse to him, discovered new evidence, will not avail him anything in a subsequent attempt to litigate the same cause of action, especially where such evidence existed at the time of the former trial and consisted of matters of public record or public notoriety. Hence, where the plaintiff was cognizant of certain fraudulent transactions at the time he filed his complaint, but chose rather to ask for damages than pray for an accounting, and where the new evidence adduced in support of a bill in equity, filed after an adverse judgment at law, was merely cumulative of that introduced in the prior action, the plea of *res adjudicata* was sustained. Price v. Dewey, \* 6 Saw., 493; 11 Fed. R., 104.

§ 828. Demurrer.—A final judgment rendered in the supreme court of Illinois, upon a general demurrer to a declaration in an action at law, is *res adjudicata*, and as such is a bar to a suit in admiralty between the same parties upon the same subject. Goodrich v. City of Chicago, \* 5 Wall., 566.

§ 829. A judgment that a declaration is bad in substance can never be pleaded in bar to a good declaration for the same cause of action. The judgment is in no sense a judgment upon the merits. Gilman v. Rives, 10 Pet., 298.

§ 830. If judgment is rendered for the defendant on demurrer to a declaration, or to a material pleading in chief, the defendant can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer determines the merits of the case and must be final. It seems, however, that if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, though the respective actions were instituted to enforce the same right, for the merits of the case as disclosed in the second declaration were not heard and decided in the first action. Gould v. Evansville, etc., R. Co., 1 Otto, 526 (§ 710).

§ 831. Final judgment or decree.—Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action. So where a judgment is reversed on appeal and the case is sent back for a new trial, the proceedings do not constitute an estoppel. Aurora City v. West, 7 Wall., 82.

§ 832. To maintain a plea of *res judicata*, the decree must be final, so that an appeal will lie. New Orleans National Bank v. Adams, 3 Woods, 21.

§ 833. A decree in a state court charged S., who had appeared and answered to the merits, with a certain sum for rent of a house, and on appeal it was confirmed. Afterwards the complainant amended his bill by leave of the court by bringing in H., claiming that he was equally liable with S., and that both S. and H. were liable for the rent of certain furniture. The bill as thus amended was taken *pro confesso*, but on application of the parties the latter decree was set aside, and afterwards the case was removed to a federal court. Held, that the first decree was conclusive against S. as to his liability for rent, and that it stood against him as if the amended bill had not been filed. French v. Hay, 22 Wall., 238.

§ 834. Extrinsic evidence.—Whenever a judgment is relied on as a bar, and the form of the issue in the trial relied on is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury and were necessarily passed on by them. Miles v. Caldwell, 2 Wall., 35.

§ 835. A judgment rendered on a demurrer alleging the want of a material fact in the declaration is not a bar to a second action presented by a declaration wherein the material fact omitted from the first is sufficiently averred. Such a judgment is not a judgment on the merits. In such a case parol evidence is admissible to show that what properly might have been decided under the pleadings was in fact passed upon at the trial. Spicer v. United States, \* 5 Ct. Cl., 34.

§ 836. A judgment is conclusive of the questions put in issue and tried, in a subsequent suit between the same parties; and where from the nature of the pleadings it is left in doubt on what precise issue the judgment or verdict was rendered, it is competent to ascertain this on the second trial. Campbell v. Rankin, 9 Otto, 261.

§ 837. Where a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at

issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. *Davis v. Brown*, 4 Otto, 423.

§ 838. Extrinsic evidence given by the plaintiffs to show that the matters in controversy in the action are the same as those determined in a prior suit, may be controverted by the defendants. *Packet Co. v. Sickles*, 5 Wall., 580.

§ 839. Estoppel.—Where both parties are concluded by the findings and judgment, if either is, the estoppel is mutual within the rule requiring mutual estoppels. *Four Hundred and Twenty Mining Co. v. Bullion Mining Co.*, 3 Saw., 634.

§ 840. A party is not bound or estopped by the judgment of a court as to any matter not within the purview of the proceeding before it, or directly put in issue therein. *Sample v. Bank of British Columbia*, 5 Saw., 394.

§ 841. When, in Illinois, fraud had been set up as a defense in ejectment, and judgment on that issue has gone against the defendant, he is precluded by that judgment from bringing suit in equity against the plaintiff setting up the same frauds and sustaining them by the same evidence. *Blanchard v. Brown*, 8 Wall., 245.

§ 842. A party failing to produce his account in a suit against him on another and distinct account is not precluded by the judgment in that action from suing on his own account subsequently. *Robinson v. Wiley*, \*Hemp., 88.

§ 843. The petition for the appointment of an administrator, and the proceedings thereon, are in the nature of proceedings *in rem*. All the world is a party to the proceedings, and consequently all the world is estopped by the adjudication thereon. *Holmes v. Oregon, etc., R. Co.*, 7 Saw., 880; *Grignon v. Astor*, 2 How., 338.

§ 844. In trover for a slave, the plaintiff cannot recover if he has obtained judgment against the defendant in a previous suit for the hire of the slave to a period subsequent to the commencement of the action of trover; but if, in making his claim for the hire of the slave, he did not mean to charge for the hire to a period later than the commencement of the action of trover, then such mistaken claim, and the judgment thereon, are not conclusive evidence against the plaintiff in the action of trover. *Semmes v. Sherburne*, 2 Cr. C. C., 637.

§ 845. A. sued B. to recover land. Judgment was rendered for defendant. A. then conveyed to C., and C. sued B. for the recovery of the same land. The court held the judgment in A. v. B. an estoppel, and gave judgment for defendant. Afterwards the judgment in A. v. B. was reversed and the cause remanded for a new trial, C. having in the meantime conveyed to D. B. having filed a supplemental answer showing the series of conveyances, and that the suit was really prosecuted for the benefit of D., set up the judgment in C. v. B. as an estoppel. Held, that the judgment in C. v. B. was based on the first judgment in A. v. B., the reversal of which removed the matter of estoppel, and that the judgment in C. v. B. constituted no defense to the action in the interest of D. *French v. Edwards*, 4 Saw., 125.

§ 846. Modification of decree too broad.—Where a judgment is broader in its scope, and more to the advantage of a party, than he is entitled to have it, it may be reversed and modified by the appellate court on the ground that all the points covered by it would be *res adjudicata*, and operate as an estoppel, whereas, some points ought not to be considered as finally determined, which upon the record as presented would be concluded. *Four Hundred and Twenty Mining Co. v. Bullion Co.*, 3 Saw., 634.

§ 847. Decree of probate court.—If a decree of the supreme court of probate reverse that of the inferior court decreeing the distribution, such reversal is no bar to a subsequent suit by the parties claiming as heirs or legal representatives. *A fortiori*, it is no bar to a bill in equity. *Harvey v. Richards*, 2 Gall., 216.

§ 848. Forfeiture—United States courts.—The courts of the United States have an exclusive cognizance of the questions of forfeiture upon all seizures made under the laws of the United States, and it is not competent for a state court to entertain or decide such questions of forfeiture. If a sentence of condemnation be definitely pronounced by the proper court of the United States, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture, and in either case the question cannot be again litigated in any common law forum. *Gelston v. Hoyt*, 8 Wheat., 246.

§ 849. In admiralty.—A decree of a court of admiralty *in rem* is final and conclusive as to all the matters in controversy; and the grounds of the decree cannot be inquired into in another admiralty court, on a libel to carry the decree into execution. *Penhallow v. Doane*, 3 Dal., 54.

§ 850. The fact that the holder of an admiralty lien has recovered judgment for the amount of his claim in a court of law *in personam* does not constitute a bar to a proceeding in admiralty to enforce his lien. *Rogers v. The Reliance*, 1 Woods, 274.

§ 851. Title to land—Ejectment.—A decree settling the title to real estate, as between the parties to it, is conclusive in any other court. *Parrish v. Ferris*, \*2 Black, 606.

§ 852. A suit having been brought in Ohio, under a provision in the statute, for the purpose

of determining an adverse title, the decree following thereon was held to be conclusive on the complainant and his privies. *Ibid.*

§ 853. A decree upon a title to land, actually litigated and determined in a case, is conclusive as between the same parties, in a subsequent action touching the identical title to the same land; otherwise as to those matters not in issue, and not litigated and determined. *Starr v. Stark*, \* 2 Saw., 641.

§ 854. In a suit to quiet title it seems that its discontinuance after a decree of the supreme court will not limit the effect of the decree as *res judicata*. *Parker v. Kane*, 22 How., 1.

§ 855. It seems that a suit to quiet title is conclusive between the parties in ejectment. *Ibid.*

§ 856. In a suit to remove a cloud on a title, the court, after a hearing, dismissed the bill, holding that the plaintiff was not entitled to the relief prayed for, nor to any relief in the premises, from the court. *Held*, that this was not conclusive of the plaintiff's want of title in ejectment by the plaintiff against the defendant. *Phelps v. Harris*, 11 Otto, 870.

§ 857. A judgment of ejectment rendered in a state where it is provided by statute that such a judgment shall be a bar to another action between the same parties will be treated as final and conclusive by the federal courts. *Miles v. Caldwell*, 2 Wall., 85.

§ 858. Under the laws of Arkansas an action of ejectment, where both parties claimed to be absolute owners in fee, is a bar to a subsequent action between the same parties for the same land where the same titles are relied on. *Sturdy v. Jackaway*, 4 Wall., 174.

§ 859. Under the laws of Oregon a verdict in ejectment that the defendant is entitled to the possession of the premises is not conclusive in another action for the same property between the same parties or their privies. *Fitch v. Cornell*, 1 Saw., 156.

§ 860. A defendant in ejectment cannot protect himself by setting up the record in a prior chancery suit between the same parties, by which the plaintiff in the ejectment had been ordered to convey all his title to the defendant in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made. *Hickey v. Stewart*, 8 How., 750.

§ 861. A former suit in chancery between the original parties to the mortgage, involving directly the validity of that instrument, in which suit a bill to foreclose was dismissed, upon the ground that the mortgage was void, was good evidence in an ejectment brought by the assignee, claiming to recover by virtue of the same mortgage. The instrument having been declared void by a court of competent jurisdiction, neither the parties nor their privies could recover on it. *Smith v. Kernochen*, 7 How., 198.

§ 862. Contract—Tort.—A judgment in an action of *assumpsit*, brought by a husband and a wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of *assumpsit* on the same contract by the husband alone to recover for the same injuries. A different rule prevails when the action is in tort against the carrier for a breach of his public duty, except perhaps in states where, by statute, the husband may, in such an action, add claims in his own right to those of his wife. *Pollard v. Railroad Co.*, 11 Otto, 228.

§ 863. Payment of money into court—Interplea.—A suit in equity was brought by R. in a state court against an insurance company and B. and W., who claimed to be the owners of an insurance policy and entitled to the sum due thereon, to enjoin the company from paying the amount of the policies to B. and W., and to have the right to such policies declared to be in R. The liability of the company being conceded, it obtained an order in the suit that it be allowed to pay the money into court for the use of the person entitled thereto, and that it be thereupon discharged from liability to R. or to B. and W., and that R. and the other defendants interplead. *Held*, that this decree was admissible as evidence in, and was a bar to, an action in a federal court by the assignees of B. against the insurance company, to recover on the policies in question. *Insurance Co. v. Harris*, 7 Otto, 331.

§ 864. Counter-claim—Proof in bankruptcy.—In a suit by A. against B., B. set up a cause of action against A. by way of counter-claim. Before trial A. became bankrupt. On the trial no evidence was offered as to the counter-claim. The assignee was not joined. *Held*, that the judgment was no bar to proof of the claim against the bankrupt's estate, and that though from the record it would be presumed that the question of the counter-claim was litigated, yet it might be shown by evidence *dehors* the record that no evidence in relation thereto was in fact given. *In re People's Safe Deposit & Savings Institution*, 10 Ben., 88.

§ 865. Confirming judicial sale.—Under the monition act of Louisiana, if the proper notices of the proceeding are given, the judgment therein confirming a judicial sale is conclusive on all persons, and the validity of the sale is *res judicata*, both in the state and the federal courts. *Jeter v. Hewitt*, 22 How., 832.

§ 866. Judgment against executors—Heirs.—It is understood to be settled in Virginia that no judgment against the executors can bind the heirs or in any manner affect them. It could not be given in evidence against them. *Deneale v. Archer*, 8 Pet., 528.

§ 867. *Miscellaneous.*—Where a will was established in New Orleans, in 1792, by order of the alcalde, an officer who had jurisdiction over the subject-matter, his decree must be considered as a judicial act, not now to be called into question. *Fouvergne v. City of New Orleans*, 18 How., 470.

§ 868. After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved, before the referee, all the damages he had sustained, or that his damage exceeded the amount which the arbitrator awarded. *Kendall v. Stokes*, 8 How., 87.

§ 869. Judgment in a trustee process, in Massachusetts, against the defendant as garnishee of the plaintiff, is no defense in a suit for debt, if the plaintiff in the original trustee process has, by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution can no longer issue upon it, and it cannot be revived by a *scire facias*. *Flower v. Parker*, 8 Mason, 247.

§ 870. Certain lots were conveyed by trust deed to secure certain notes, and afterwards a paper-mill and appurtenances were erected thereon. Default in the payment of the notes having been made the land was sold by the trustee as it was before the erection of the paper-mill. On a bill filed for that purpose the sale was declared void, for the reason that the land and the mill and appurtenances should have been sold together. *Held*, that this determination was conclusive on a bill filed to enforce the sale against all of such property. *Hill v. National Bank*, 7 Otto, 450.

§ 871. A decree of foreclosure in a state court is conclusive of a suit in a federal court, by a judgment creditor whose judgment was a lien on the equity of redemption, to set aside the mortgage for fraud, and to have certain alleged usurious payments of interest applied to the reduction of the principal, although these matters were not litigated in the state court. *Stout v. Lye*, 13 Otto, 66.

§ 872. A judgment against a municipality sustaining the validity of a portion of a series of bonds is conclusive in a suit by the same person upon another portion of the same issue, where the title involved is the same, and all objections taken in the second suit could have been raised in the first. *Beloit v. Morgan*, 7 Wall., 619.

§ 873. A., the owner of municipal bonds, sought by *mandamus* in a state court to compel the payment of coupons detached from them. The county defended on the ground that the bonds were invalid, and on the trial of that issue judgment was rendered for the defendant. *Held*, that such judgment was conclusive on one suing in a federal court for the benefit of A. *Block v. Commissioners*, 9 Otto, 686.

§ 874. The decision of a state court, based on a state statute, that a certain equitable interest in land could not be subjected to the claims of a creditor, is, as between the same parties, *res judicata* in the federal courts, though on the general principles of jurisprudence the decision would be otherwise. *Nichols v. Levy*, 5 Wall., 438.

§ 875. A claim which has been urged as a set-off, and rejected by the jury, is *res adjudicata*. *Janney v. Smith*, \* 2 Cr. C. C., 499.

## V. LIEN AND PRIORITY OF JUDGMENTS AND EXECUTIONS.

SUMMARY—On land, at common law, § 876.—Statute of *elegit*, § 877.—Adoption of state laws, § 878.—Verdict not entered of record, § 879.—Docketing judgment, § 880.—Regulated by state laws, § 881.—Judgments of federal courts in general, § 882.—Effect of section 916 of the Revised Statutes, § 883.—Judgment not docketed as required by state laws, § 884.—Judgments in favor of United States, § 885.—Decrees in admiralty, § 886.—Mortgage and lien covering different portions of railroad, § 887.—On railroad and lands, § 888.—Judgments of federal courts are liens co-extensive with the jurisdiction of the court, §§ 889-893.—Construction of state law binding on federal courts, § 894.—Alienation before lien attaches, § 895.—Proceedings under *ca. sa.*, §§ 896, 897.—Levy relates back, § 898.—In Tennessee, § 899.—Priority of judgment by default over deed of trust, § 900.—Trustee for benefit of creditors not a bona fide purchaser, § 901.—As to recording of conveyances, § 902.—Priority; no fractions of a day, § 903.—Priority in time of levy, § 904.—Priority where one seizes land and the other seizes the body, § 905.—In Virginia; issue of *elegit* within a year, § 906.—Lien on reversion; equity will accelerate payment of debt, § 907.

§ 876. As land was not liable to be sold on execution or extended at common law, at common law a judgment is not a lien on the land of the judgment debtor. *Shrew v. Jones*, 72 909-12.

§ 877. The statute of *elegit*, in subjecting real estate to the payment of debts, gave a lien on the land of the judgment debtor. *Ibid*.

§ 878. The act of congress of May 19, 1828, declaring "that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state respectively as are now used in the courts of such state," does not adopt subsequent state laws on the subject. *Ibid.*

§ 879. The decision of a court is not technically a judgment until in some form it has been entered of record. If entered in the course of judicial proceedings, of which the court has jurisdiction, it is binding until reversed or set aside, no matter how irregular it may be as to matters of form. And a judgment, otherwise duly entered, is valid and a valid lien, although the verdict on which it is rendered has not been recorded in the minutes but is in the files. *Gunn v. Plant*, §§ 913-14.

§ 880. A statutory provision that no judgment shall affect lands but upon the filing of the roll and docketing the judgment necessarily implies that upon that being done it shall affect the lands, and is equivalent to saying it shall then become a lien. *Koning v. Bayard*, §§ 915-22.

§ 881. The lien created by a judgment of the courts of the United States upon land and the mode of proceeding to obtain satisfaction of the judgment are regulated by the state laws. This is the effect of the process acts of 1789 and 1792. So where by a state law a judgment is a lien upon the land of the judgment debtor from the time it is docketed, a judgment of the circuit court of the United States has a like effect. *Ibid.*

§ 882. Judgment rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar judgments of state courts are made liens by law of the state. *United States v. Humphreys*, §§ 923-25.

§ 883. An act of the legislature of Virginia in 1872 abolished the writ of *elegit* and declared judgments to be liens on the lands of judgment debtors. Subsequently congress passed an act, now section 916 of the Revised Statutes of the United States, giving the same effect to and remedies on judgments of the United States courts as were then given by state laws to judgments of state courts. It is held that this repealed the process act of congress of 1828 as to judgments of the United States courts in Virginia, and made such judgments liens as if rendered by state courts. *Ibid.*

§ 884. Section 967 of the Revised Statutes of the United States declares that judgments of the United States courts within a state "shall cease to be liens on real estate, etc., in the same manner and at such periods as judgments of the courts of the states cease by law to be liens thereon." The laws of Virginia provide that "no judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it is docketed" in the county where the land lies. They also provide that a judgment shall be a lien on all the real estate of the debtor. Under these provisions it is held that a judgment of a court of the United States in Virginia, though not docketed, is a lien on the land of the judgment debtor superior to that of a subsequent deed of trust. *Ibid.*

§ 885. It seems that judgments in favor of the United States stand on the same principle as those in favor of the crown of England and of a state, and are liens independent of laws making judgments generally liens on the real estate of debtors. It seems that the ancient writ of *extendi facias* is theoretically in force sufficient to establish such a lien. *Ibid.*

§ 886. A decree was obtained against the respondents in Ohio, before the district court sitting in admiralty, which was afterwards affirmed on appeal to the supreme court. Subsequently, and on the day the mandate of the supreme court was received and filed, a consent decree against the respondents was also entered, wherein it was stipulated that certain payments should be made at stated times on account of the decree, and in default of any such payment complainants might collect the amount as they saw fit. After two payments by respondents default was made, and execution thereupon issued under the consent decree against the goods and chattels, lands and tenements of the respondents. Finding no goods and chattels, the marshal levied upon certain parcels of land situate in the district wherein the decree had been obtained. Adversary rights arising, the complainants filed a bill of discovery to ascertain the rights involved, and issue being joined, certain questions of law arose, causing a disagreement of opinion among the judges, which points were certified to the supreme court. It was held that in cases where a decree of the state court constituted a lien on property, the decree of a federal court was also a lien, and this being the rule in Ohio, said decree was a lien on the land; and further, that the acts of congress relative to the issuing of writs of execution on decrees, being alike applicable to courts of admiralty as to courts of equity, where a decree of the latter court would constitute a lien, the decree of the former would also be one, even though the decree in admiralty operates *in personam*. *Ward v. Chamberlain*, §§ 926-29.

§ 887. Where, by state policy, a line of railway is considered as an entirety, and there are a mortgage and a judgment lien covering distinct portions of the road, preparatory to a sale for paying off such incumbrances, each portion must be separately appraised, the road sold as an

entirety, and the proceeds will be distributed according to the priority of liens. *Ludlow v. Clinton Line R. Co.*, §§ 933-37.

§ 888. The decisions in Ohio hold that a railroad and the lands necessary for its operation, together with the franchise granted by the state, constitute real estate against which a judgment lien will operate with equal effect as a mortgage placed on such property. *Ibid.*

§ 889. The act of congress of 1828 having declared that the rules of proceeding, etc., shall be the same in the circuit court of the United States as in the highest court of original and general jurisdiction of the state, and such court in Indiana having jurisdiction co-extensive with the state, and the jurisdiction of the circuit court of the United States also being co-extensive with the state, a judgment of the latter court creates a lien upon lands throughout the state. *Shrew v. Jones*, §§ 909-12.

§ 890. In Indiana, where a judgment of the highest court of original and general jurisdiction creates a lien on the lands of the judgment debtor throughout the state, a judgment of the circuit court of the United States in Indiana is likewise a lien on lands throughout the state, and takes precedence of a subsequent judgment of a state court, although the latter is first proceeded on. *Ibid.*

§ 891. A. obtained a judgment in the United States circuit court in 1839, on which execution issued, and levy was made on certain property in possession of defendant in that suit. B., the present defendant, claimed such property, and presented a mortgage, dated subsequently to the judgment, and regularly recorded, to show a title adverse to the right of A. *Held*, that a state statute passed in 1841, providing that judgments theretofore rendered should become a lien on property when recorded in the county in which the property was situated, could not in any respect affect or impair the lien of the judgment, though the judgment had not been recorded pursuant to the provisions of the statute, the rule being, by the course of practice in the state prior to said statute, that the lien of a judgment of the circuit court extended throughout the district. *Massingill v. Downs*, §§ 930-32.

§ 892. By the statutes of Ohio a judgment is a lien on the lands of the defendant situate in the county in which the judgment is entered, and it is held accordingly that a judgment of a federal court sitting in Ohio is a lien on lands situate in any county within the district. So where a railroad company in Ohio, whose road ran through several counties, gave a mortgage on their entire road and real estate, and recorded it in only one county, and subsequently a judgment was recovered against the company in the United States circuit court, it was held that the lien of the judgment on the road and real estate of the company in those counties in which the mortgage was not recorded was superior to the lien of the mortgage. *Ludlow v. Clinton Line R. Co.*, §§ 933-37.

§ 893. A judgment was obtained in a federal court in Mississippi, but was not enrolled in the county in which the defendant's land was situated, in accordance with a state statute in force at the time the judgment was rendered, and including the judgments of federal courts by express reference, requiring such enrollment to create a lien; subsequently another judgment was obtained in a state court against the same defendant, which was enrolled in the county in which the property was situated. It was held that judgments or decrees rendered in the federal courts become liens on the property of the defendant, situated within the jurisdiction of the court rendering the judgment, from the date of the rendition, without reference to any law of the state not adopted by congress, or by the federal courts under congressional authority. *Carroll v. Watkins*, §§ 938-40.

§ 894. Although there is no act of the assembly of Maryland making judgments a lien on the lands of the debtor from the time of their rendition, yet the courts of that state give this effect to judgments in enforcing the act of parliament of 5 George II., chapter 7, which subjected lands in the colonies to executions as chattels in favor of British merchants. Though this act is confined in its terms to British merchants, the Maryland courts in their construction of it have extended it to all judgment creditors, and this construction is binding on the federal courts. *Tayloe v. Thomson*, §§ 941-43.

§ 895. Where a judgment is not a lien from its date, an alienation before execution will prevent it from attaching afterwards. *Ibid.*

§ 896. A *ca. sa.* was issued against a judgment debtor, and being committed to prison thereunder he was given the benefit of the prison rules upon giving the required bond. Having broken the prison rules and the condition of the bond, a suit was instituted and judgment obtained on the bond. A *fi. fa.* was issued on this last judgment, which was returned *nulla bona*, and the debtor was recommitted to prison under the original *ca. sa.* upon the ground that the time for which he was allowed by law the benefit of the prison rules had expired. While thus in prison he was discharged under the insolvent act for the District of Columbia. It was held that the lien of the original judgment was not impaired by these proceedings. *Ibid.*

§ 897. The commitment of a judgment debtor upon a *ca. sa.* is not an extinguishment of the lien of the judgment. It simply suspends other remedies upon the judgment during its



continuance. Whenever it terminates without the consent of the judgment creditor he is restored to all the other remedies. *Ibid.*

§ 898. A judgment lien on land constitutes no property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, to cut out intermediate incumbrances. *Massingill v. Downs*, §§ 930-32.

§ 899. The statute of 29 Charles II., as to the liens of judgments and executions, is not in force in Tennessee. The lien is regulated by the common law, modified to some extent by statutes. *Clements v. Berry*, §§ 944-46.

§ 900. A judgment by default in an action on a note of hand being final, the lien of such a judgment will take precedence of a deed of trust for creditors made after such judgment, but before its subsequent affirmation by the court and the entry of the amount. *Ibid.*

§ 901. A trustee for the benefit of creditors is not a *bona fide* purchaser for a valuable consideration within the rule that a *bona fide* purchase for a valuable consideration will limit the lien of a judgment to the time the judgment was rendered, where ordinarily such lien would attach as of the first day of the term at which the judgment was obtained. *Ibid.*

§ 902. A rule requiring the register to note the precise time of day conveyances are deposited in his office for record, while a salutary regulation as to the priority of conveyances, does not apply so as to determine the priority between a conveyance and a judgment made and entered the same day. *Ibid.*

§ 903. In Indiana, judgments are liens against "the real estate of the persons against whom such judgments may be rendered from the day of the rendition thereof." And as the statute provides for no fractions of a day, judgments rendered on the same day have equal rights. *Rockhill v. Hanna*, §§ 947-50.

§ 904. Where a statute makes judgments a lien from the time of their rendition, it seems that of two judgments entered on the same day, the one which is levied first obtains a priority, especially where the plaintiff in the one sues out a *ca. sa.* *Ibid.*

§ 905. Where judgments are made liens from the time of their rendition, and two judgments are entered on the same day, and the plaintiff in the one levies on the land of the debtor and the other seizes the body of the debtor on execution, the former has priority of payment out of the land. The latter, by seizing the body of the debtor, obtains a satisfaction of his judgment, at least until the defendant be discharged, though the lien attaches again if the debtor be discharged without the consent of the plaintiff. *Ibid.*

§ 906. In Virginia, where there is no statute making judgments a lien upon real estate of the debtor, a judgment is a lien on the land of the defendant from the time of its rendition, provided an *elegit* is issued within the year. *Burton v. Smith*, §§ 951-55.

§ 907. Where a judgment is a lien upon a reversion after a life estate, a court of equity will accelerate the payment of the debt by decreeing a sale of the reversionary interest. *Ibid.*

[NOTES.— See §§ 956-1085.]

#### SHREW v. JONES.

(Circuit Court for Indiana; 2 McLean, 78-85. 1840.)

#### Opinion of the Court.

STATEMENT OF FACTS.—The title to the lot for which this action of ejectment was brought is under a judgment of this court, obtained the 5th December, 1837, by Shrew and Winston against David Miller and others. The fee of the lot was vested in Candler, one of the defendants. The 1st of January, 1838, an execution was duly issued upon said judgment and delivered to the marshal to be executed. This writ was returned replevied, with a replevy bond duly executed.

Afterwards, the 17th of December, 1838, another execution was duly issued, which was levied by the marshal upon lot 142, in the town of Logansport, as the property of Candler. This lot was sold by the marshal, on due notice being given to the lessor of the plaintiff, for the sum of \$550, which was paid, and a deed was duly executed by the marshal. No copy of this judgment was ever filed in the clerk's office under the statute of Indiana.

The defendant's title was derived under a judgment against Candler and

Sludge, the 26th February, 1838. Execution was issued on this judgment the 19th April, following, which was returned no property found. An *alias fi. fa.* was issued the 24th September, ensuing, and levied on the lot in controversy, which was sold by execution the 10th May, 1839, to Jones, the defendant, who received the sheriff's deed. The above facts are admitted by the parties, and that the proceedings in both cases were regular.

The judgment of this court, under which the lessor of the plaintiff claims, having been first obtained, it is insisted that his right is paramount to that of the defendant. On the part of the defendant it is contended that the judgments of this court create no lien on the real estate of the defendant, beyond the limits of the county in which judgment is entered; and that the judgment before the state court in Cass county, where the lot is situated, being obtained before the levy under the first judgment, it has the prior lien. And this is the only question in the case.

§ 908. *At common law a judgment was not a lien on land.*

As land was not liable to be sold on execution, or extended at common law, it is clear that at common law the judgment created no lien on the land of the defendant. But the argument is not sustainable that a judgment cannot operate as a lien on real estate unless this effect be specially given to it by statutory provision.

§ 909. — *the elegit subjecting land to the payment of debts gave a lien.*

The statute of 2 West., 13 Ed. 1, gave the elegit which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 Salk., 212; 1 Wils., 39; 2 Leigh, 268; 6 Rand., 618; 4 Pet., 124; 2 Brock., 252; 3 Bl. Com., 418; 2 Bac., 731; 5 Pet., 367. The same doctrine was held by the supreme court of this state in a learned and able opinion in the case of *Ridge v. Prather*, 1 Black, 401. The court say, "we have always had a statute at least as strong as that of West. 2, by virtue of which judgments are liens upon real estate." But until the act of 1818 there was no statute declaring that judgments should be a lien on real estate. In the view of the court such lien arose from the various acts subjecting lands to execution.

§ 910. *The lien of judgment is co-extensive with the jurisdiction of the court.*

The thirteenth section of the act of 1818, entitled "An act to prevent frauds and perjuries," gives a lien on the real estate of the defendant from the time of signing the judgment. This statute, it would seem, was introductive of no new principle, but gave effect from a specified time to a judgment lien. It is unnecessary to inquire whether prior to this time the lien took effect from the commencement of the term or not; it is enough to know that it existed. The lien, under this statute, as well as that which existed before the statute, being general, must have extended throughout the state. The circuit courts had power to issue executions to any county in the state. And as their jurisdiction thus to enforce their judgments extended throughout the state, the lien must have been co-extensive with their jurisdiction.

This act was modified by an act subjecting real and personal estates to execution, approved 30th January, 1824. The thirteenth section of this act provides that judgments in the circuit courts are hereby made liens on the real estate of the defendant or defendants, from the day of the rendition thereof, in the county where such judgments may be rendered. And, on recording a copy of the record of such judgments in the clerk's office of any other county, the same operates as a lien within such county. This act is restrictive of the

lien of a judgment of the circuit court, but it could have had no such effect on a judgment entered by the supreme court of the state. This point is not known to have been decided by the supreme court of the state, but it is one which would seem to admit of little or no doubt.

If, before the passage of this act, the liens of the judgments of the supreme and circuit courts extending throughout the state, which, it is presumed, no one will controvert, it is clear that the restriction of the lien on the judgments of the circuit court could impose no restriction on the judgments of the supreme court. If anything were wanted to make this view conclusive, it is found in the act of 1831. The twenty-second section of this act, which was enacted to prevent frauds and perjuries, etc., provides that judgments in the circuit and supreme courts of this state shall have the operation of, and be, liens, etc., in the county within which such judgments may be rendered.

This act has never received a construction by the supreme court of the state, nor is it important now to inquire whether the effect of it must be to limit the lien of the judgments of the supreme court to the county of Marion, in which, only, its sessions are held. It is enough to know that the object of the act was, in some degree, to restrict the liens of the judgments of that court; and that such restriction was not imposed by the act of 1824. It is true that in the act of 1831 the circuit court is named with the supreme court, but this was necessary, as the latter act changed somewhat the duty of the clerk who records the transcript. The ground may then be assumed that, up to the year 1831, the original judgments of the supreme court created a lien throughout the state.

By the act of congress of the 19th May, 1828, it is provided "that writs of execution, and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state respectively, as are now used in the courts of such state." This act places the states that have been admitted into the Union since the judiciary act of 1789 was passed, in regard to the proceedings of the courts of the United States, in all respects, with the exception of Louisiana, on the same footing. As this fact has often been stated by the supreme court, it is unnecessary to examine it. The act of 1828 adopts the laws of Indiana which existed at the time of its passage, and not those which have been subsequently enacted on the same subject. Congress have not adopted the laws of any state, in regard to the practice of the courts of the United States, prospectively. The law of Indiana, in 1828, in regard to judgments and executions in the supreme court, is the law by which the present question must be decided.

In the case of *Tayloe v. Thomson*, 5 Pet., 367 (§§ 941-43, *infra*), the court say, "the first point made by the plaintiff in error is that, by the law of Maryland, which, it is admitted, is the rule by which this point is to be determined, a judgment is no lien on real estate before execution was issued and levied."

And in the case of *Conard v. Atlantic Ins. Co.*, 1 Pet., 453, the court say the judgments in the federal courts, within the district of New York, are liens upon real property in like manner as judgments of the state courts, and to the extent of the local jurisdiction of the court. And so, in every other state, the judgments of the federal courts have the same lien to the extent of its jurisdiction as the judgments of the highest court of the state.

The act of 1828 declares that the rules of proceeding, etc., shall be the same in the circuit courts of the United States as in the highest court of original

and general jurisdiction of the state. The supreme court of Indiana is the highest court of the state, and its jurisdiction is co-extensive with the state. Prior to the act of 1831 a judgment of that court constituted a lien throughout the state, and as the jurisdiction of the circuit court of the United States is also co-extensive with the limits of the state, its judgments must create a lien to the same extent.

§ 911. *The federal courts cannot require their judgments to be recorded by clerk of state court.*

If, as contended, the liens of the judgments of this court be limited to the county in which they are rendered, as in the inferior courts of the state, the judgments of this court have, in effect, no lien. The law of the state, which extends the lien of a judgment of the circuit court of the state to any county within which the record of such judgment shall be recorded, can have no application to this court. We have no right under it to require our judgments to be recorded by any clerk of the state court.

The law of Indiana, regulating judgments and executions, as it stood in 1828, is the law of congress by adoption. Effect must be given to the provisions of this law so far, at least, as they are adapted to the organization and powers of this court. If the rules of proceeding by the circuit courts of the state be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. The limits of the state, in the exercise of the jurisdiction of this court, is as the limits of a county to the local court.

§ 912. *State laws regulating procedure in federal courts.*

The modes of judicial proceedings and rules of property are different in the different states; and in adopting those rules congress designed, as far as practicable, to give the same effect to them in the courts of the Union as in the courts of the state. No other course of legislation could have been so well calculated to produce a harmonious action in the judicial departments of both governments. But if a state law, being framed in reference to the limited jurisdiction of the state courts, for this reason cannot constitute a rule for the federal courts, the legislation of congress on the subject has been in vain. Such has not been the view taken by the courts of the United States.

The law of the state regulates the proceedings of a sheriff on execution. He is to advertise the property, real or personal, etc., but his duties are all limited to the county. The same rule governs the marshal and operates throughout the state. The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, and they are made to operate throughout a more extended jurisdiction. But as it regards the main and, indeed, the only question in this case, we have no need to resort to this course of induction. As has been stated, the judgment of the supreme court of this state, in 1828, operated as a lien on the real estate of the judgment debtor throughout the state, and this is conclusive of the question. The same effect is given to the judgments of this court.

In the case of the lessee of Sellars v. Corwin, 5 Ohio, 398, the supreme court, in a very elaborately considered case, decided that, under a law of that state giving judgment liens, in effect, the same as in this state, the judgment of the circuit court of the United States constituted a lien to the extent of its jurisdiction. No supposed inconvenience which arises under the laws of 1828, in regard to judgment liens, and which have been remedied by the act of 1831, can operate against this construction. In most of the states, it is believed, the judgments of the circuit court of the United States operate as a lien to the

extent of its jurisdiction. If it shall be deemed important to have the records of the judgments of this court recorded in the county where the lands of the defendant are situated, it may be required by act of congress or by a rule of this court, if the law of the state shall require the clerks to make such record.

## GUNN v. PLANT.

(4 Otto, 664-671. 1876.)

APPEAL from U. S. Circuit Court, Southern District of Georgia.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—The facts in this case, as they are presented to us by the pleadings and proof, are as follows:

In the suit of Gunn v. Woolfols a verdict was rendered in due form by a jury, but, through the omission of the clerk, it was not spread upon the minutes of the court. Notwithstanding this, however, a judgment was regularly entered. That is expressly stated in the bill and shown by the transcript of the record of the superior court. Such a judgment was also recognized by the court as actually existing in due form, when, at the subsequent term, an entry of the verdict upon the minutes, *nunc pro tunc*, was allowed, and a judgment given for the interest. The statement in the answer of Gunn, that "at the same term a judgment was regularly entered upon the verdict," but admitting "that afterwards, by omission of the clerk, the same was not entered on the minutes," while, taken by itself, perhaps implying that the judgment was not entered, was evidently intended to apply only to the verdict; for it is expressly averred that the judgment was regularly entered upon the verdict, and that the only omission complained of was supplied by the subsequent record of the verdict. This, too, is in accordance with the theory of the bill, which is, that, at the time the mortgage was executed to the complainants, the judgment was not a lien, for want of a verdict appearing on the minutes to support it. The learned circuit judge, who decided the case below, says in his opinion that "the only evidence of any verdict or judgment . . . is in the verdict of the jury indorsed on the declaration, and a judgment for the principal sum due, also written upon the back of the declaration by the plaintiff's attorney, and signed by him;" but there is no such evidence before us. Here the record shows a judgment duly entered, with nothing to indicate that it was only a "memorandum of counsel." Our decision must be upon the case as it comes to us, and not upon what it may have been below.

No question is raised as to the right of Gunn to assert his lien for the interest on his debt, under the amendment to the judgment as entered in April, 1871, because the amount of money in the hands of the trustee is not enough to discharge the balance of principal due. When the second entry was made, the original judgment was not set aside, or amended even, but a new judgment was entered for the interest. Upon this state of facts, the question presented for our determination is, whether a judgment otherwise duly entered is void, if the verdict on which it was rendered had not been recorded in the minutes; for, if voidable only, it is good until reversed by a direct proceeding for that purpose, and cannot be impeached collaterally.

§ 913. *A judgment duly entered is binding until set aside, notwithstanding irregularities in matters of form. (a)*

It is very clear that a decision of a court is not technically a judgment until

(a) A judgment is the decision or sentence of the law upon facts found or admitted by the parties, or upon their default in the course of a suit. But a bare decision of a court is not a

in some form it has been entered of record. If entered in the course of judicial proceedings, of which the court has jurisdiction, it is binding until reversed or set aside, no matter how irregular it may be as to matters of form. *Cooper v. Reynolds*, 10 Wall., 316 (§§ 22-26, *supra*). In this case a judgment was entered in due form. As a judgment, it was complete. There had been a verdict, and that appeared among the files in the cause. It was within the power of the court, therefore, to enter the judgment. The only defect in the proceedings is an omission to properly record the verdict. That seems to us an irregularity only. The court had jurisdiction of the cause and of the parties, and in due course of proceeding had the power to enter the judgment, and did so. This the record shows. A person interested in the question would, upon application at the clerk's office, have found a judgment recorded in the proper place. In the form it was entered it was a lien upon the lands of the defendant. This was the essential fact. It matters not that the record also disclosed an irregularity, for which, unless it could be cured, the judgment as recorded might, upon proper application, be set aside; for, until set aside, it continued in force as a subsisting lien.

In this particular the case is different from that of *Administrators of Liger v. Rogers*, 12 Ga., 283. There the judgment as entered did not create the lien. The amendment subsequently made was necessary to give it that effect, and between the date of the original entry and the amendment a purchaser without notice had intervened. Here the lien is complete if the judgment stands. The only question is whether it can stand. The amendment to the record is not to give the judgment additional effect, but to sustain the effect it already has. Finding it recorded, a purchaser would be put upon inquiry for the verdict, and such an inquiry would have discovered it on the files. True, it should have been entered on the minutes. That was the duty of the clerk, and, if he fails in this, "the court may at any time have the misprision corrected." *Pearce v. Bruce*, 38 id., 451.

We think, too, the case is distinguishable from that of *Lea v. Yates*, 40 id., 56. There in a suit pending, "the counsel for the defendant made the following confession, which was entered on the minutes as made: 'We confess judgment to the plaintiff for the sum of \$—, with interest and costs, reserving the right of appeal.' Upon this confession, the counsel for the plaintiff entered up judgment for \$224.58 principal, and \$4.71 of interest." At a subsequent term of the court an order was passed filling the blank in the confession to correspond with the judgment; but in the meantime the judgment debtor had sold the lands which were the subject-matter of the controversy, and the question was, whether the lien of the judgment took effect as against this purchaser at the date of the original entry, or not until the amendment was made. The court held that it did not take effect until the amendment, and in the opinion uses this language: "Till this amendment was made, we think this judgment had no validity. It rested upon neither the verdict of a jury, nor a confession by the defendants for anything but costs of suit. The amount

judgment; there must be a formal order entered upon it. A judgment of a court can only be shown by its records; where there is no judgment there is no record. Under the law of Georgia, requiring the court to keep fair and regular minutes of its proceedings, and under the local decisions that entries on the bench docket are not evidence of what has been adjudicated by the court, a judgment is not a judgment as against a mortgage until it is entered on the record of the court, although the bench docket recites a verdict. Subsequent action of the court in entering judgment on the verdict, or hearsay evidence of a judgment, cannot affect the rights of intermediate incumbrancers. *Plant v. Gunn*,\* 2 Woods, 372.

of principal for which it was rendered had never been agreed upon by the parties, and as there was no definite sum of principal, there could be no calculation of interest." In that case there was no authority for the judgment, and the record disclosed that fact. Here there was in the files of the cause the evidence of complete authority to render the judgment for all that was given and more. There is no necessity for supplying any defect in the authority as it actually existed. All that is required is to correct a "misprision" of the clerk and record the verdict as it appeared in the files. It was in writing and signed by the foreman in accordance with the practice in Georgia. The subsequent entry of the judgment is complete evidence of its acceptance by the court. The case of *Dornick v. Reichenback*, 10 S. & R., 90, is not an authority against this position, for in Pennsylvania the practice is, as appears in that case, not to take verdicts in writing, but to receive them "from the lips of the foreman, and record them in the usual way." In Georgia, however, they are delivered in writing and kept with the files. In this way the evidence of what the verdict actually was can be preserved without an entry on the minutes.

§ 914. *Omission to record verdict on which judgment is entered does not affect the lien.*

We think, therefore, that upon the case as it is presented to us, the court erred in deciding that the lien of the mortgage to the complainants was superior to that of the judgment of Gunn. In our opinion the judgment was valid, and a lien upon the property from the time of its rendition at the November term, 1866.

The circuit court did not pass upon the other branch of the case, and as the facts appearing in the record are not sufficient to enable us to decree affirmative relief in this particular, the decree of the circuit court will be reversed and the cause remanded, with instructions to proceed in accordance with this opinion, as equity and justice may seem to require; and it is so ordered.

#### KONING v. BAYARD.

(Circuit Court for New York: 2 Paine, 251-261.)

Opinion by THOMPSON, J.

STATEMENT OF FACTS.—This case comes before the court on a general demurrer to the plea, to a *scire facias* issued in the cause to revive the judgment and obtain execution thereon. The *scire facias* prays execution to be levied on the lands and tenements which were of William Bayard, deceased, on the 20th day of September, in the year 1825, being the day on which the judgment against him was docketed. To this *scire facias* William Renwick, one of the terre-tenants, pleaded that after the judgment was given, and before any execution had been issued thereon, the executors of William Bayard, deceased, by virtue of a power given to them by his will, had conveyed to him the lands of which he was returned terre-tenant for a valuable consideration and without notice of the judgment, and insisting on this conveyance as a bar to the execution prayed for. To which plea a general demurrer was interposed.

§ 915. *Federal and state laws on the subject of liens of judgments.*

Under this state of the pleadings the general questions which have been raised and discussed at the bar are whether, in the state of New York, lands may be taken and sold on execution issued upon a judgment in the circuit

court of the United States; and if so, whether such judgment is a lien upon the land, and from what time as against *bona fide* purchasers.

The first question was not much pressed, and indeed the plea is not framed so as properly to raise this objection, but rests upon the allegation that the purchase was made after the judgment and before execution issued. An admission, however, that lands may be taken and sold under a judgment in the courts of the United States, has a material bearing upon the other questions. For, it may be asked, by what authority are they made liable? There is no act of congress expressly making lands liable to such execution; and if liable at all, it must grow out of the operation of what are commonly called the process acts of 1789 and 1792 (Vol. II, L. U. S., 72, 299), thereby adopting the state law upon the subject. And if the state law is adopted for this purpose, it is difficult to assign any satisfactory reason why it is not adopted as to the effect and operation of the judgment as a lien.

§ 916. *Time when the lien of judgment attaches to lands.*

But the material inquiry is whether the judgment became a lien upon the land from the time of its being docketed so as to overreach a subsequent *bona fide* sale.

It has been said that if the process acts should be deemed to have adopted the state law in relation to judgments, it must be the law as it existed in the year 1789, and must be governed by the statute of this state of the 19th March, 1787 (Vol. II, Jones & Varick's ed., 113), and which is supposed to differ from the present law on that subject. But I apprehend the distinction which has been taken is not well founded. There is some small variation in the phraseology, but not such as to affect the sense and meaning of the laws. By the present law the judgment is expressly declared to be a lien upon the lands, tenements and real estate of the person against whom the judgment is recovered. By the act of 1787, there is no such express lien created, but it is necessarily implied; and in the revision of the laws in 1813, the phraseology is altered, expressing only what was before necessarily implied, and it has never been understood that it made any difference in the interpretation of the law. By the act of 1787, all the lands, tenements and real estate of the debtor are expressly made liable to be sold on execution, and it declares that no judgment shall *affect* any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators in their administration, but from the time of the actual filing of the roll or record of the same judgment in the clerk's office and the docketing the judgment by the clerk in the manner directed by the act. The declaration that no judgment shall *affect* lands but upon the filing the roll and docketing the judgment, necessarily implies that upon that being done it shall affect the lands, and is equivalent to saying it shall then become a lien.

But it is said that if the judgment becomes a lien on the lands upon the docketing of the judgment, there is no act of congress authorizing or requiring such docketing. Nor is there any rule of this court which directs the signing and filing the judgment nor the docketing of judgments; so that the executions upon judgments in this court cannot direct a levy upon any lands except such as are owned by the defendant at the time of issuing the execution. The answer to the first branch of the objection will depend upon the question (which will be hereafter considered) how far congress, by the process acts, has adopted the state law in this respect.



§ 917. *The docketing of judgments relates to the practice of the court, which may regulate it according to its pleasure.*

The second branch of the objection seems to imply that an express written rule of the court must be shown in order to justify the practice of docketing judgments. There can be no doubt but the court would have authority to make such a rule under the power given by the seventeenth section of the judiciary act of 1789, and the seventh section of the act of 1792. It was a matter relating to the practice of the court which the court might regulate according to its own pleasure, provided it was not repugnant to the laws of the United States, and it never has been understood that such practice could be shown only by written rules.

§ 918. *A practice that has existed for years will be presumed to have been established by order of court.*

If the practice has existed for a series of years, it is to be presumed that it has been established under the order of the court. This was the view taken of this question by the supreme court in the case of *Fullerton v. The Bank of the United States*, 1 Pet., 612 (BILLS AND NOTES, §§ 1200-4). In speaking of the rules of the circuit court for the state of Ohio, it is said, when this circuit was established in the year 1807, the judge assigned to it found the practice of the state courts adopted *in fact* into the circuit court of the United States, and it has not been deemed necessary to make any material alterations since; but as far as it was found practical and convenient, the state practice has, by uniform understanding, been pursued by the circuit court, *without having passed any positive rules upon the subject.*

A regular docket of all judgments in this court has been kept by the clerk, from the year 1795 to the present time, in the manner required by the act of 1787 to be kept by the clerks of the state courts. Such unbroken practice for more than thirty years is amply sufficient to warrant the conclusion that it was adopted by order of the court.

It seems to have been tacitly admitted in cases which have arisen in several of the circuit courts of the United States, that the lien created by a judgment in the courts of the United States upon land, and the mode of proceeding to obtain satisfaction of the judgment, were regulated entirely by the state laws. In the case of *Hurst v. Hurst*, 2 Wash., 69, in the Pennsylvania circuit, the question was as to the distribution of certain moneys (brought into court) among judgment creditors. Some of the judgments were recovered in the state courts, and some in the courts of the United States; and throughout the whole argument at the bar, and in the opinion of the court, there is no intimation but that the lien under the judgments in the United States courts was to be considered precisely as if obtained in the state courts; and it is expressly stated by the court to be a case arising out of a state law. So, also, in the case of *The United States v. Slade*, 2 Mason, 71, in the circuit court for Massachusetts, the United States claimed title under a judgment recovered in the district court of Massachusetts, and the question turned upon the validity of the levy and setting off the lands upon the execution issued upon that judgment, and in considering and deciding upon the objections, the court was governed entirely by the state law of 1784.

And in the case of *Thelluson v. Smith*, 2 Wheat., 397 (Gov., §§ 824-27), in the supreme court of the United States, the question grew out of a judgment recovered in the circuit court for the district of Pennsylvania, and no sugges-

tion was made at the bar or from the bench that the judgment was not a lien upon the debtor's land; but, on the contrary, a general observation is made by the court that a judgment gives to the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. And when some explanation of this case is made in *Conard v. The Atlantic Ins. Co.*, 1 Pet., 443, the court say, it is not understood that a general lien by judgment on land constitutes *per se* a property or right in the land itself; it only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, so as to cut out intermediate incumbrances.

It is true that in these cases the question whether judgments in the United States courts were liens on land or not was not the point directly decided, but it seemed to be taken for granted, both by the counsel and the court, that they were. But if any doubt existed on this point, the question is put at rest by the decision of the supreme court in the cases of *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452-60, *infra*), and *The United States Bank v. Halstead*, 10 Wheat., 51 (§§ 1461-66, *infra*).

§ 919. *Modes of process in United States courts under acts of 1789 and 1792.*

In these cases the court went into a very full explanation and construction of the process acts of congress, which have been already referred to. By the first act of 1789, it is declared that until further provision is made, and except where by this act or other statutes of the United States it is otherwise provided, *the forms of writs and executions, except their style, and modes of process* in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. The act of 1792 contains substantially the same directions with respect to the forms of writs, executions and other process, and the forms and *modes of proceeding*, etc., in the circuit and district courts, with the following addition: "subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same."

§ 920. *The expression, modes of process, used in acts, defined.*

The court say that the word *form*, as used in these acts, has much of substance in it, because it consists of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate so far as respects the object to be accomplished; that *modes of process or proceeding* indicate the progressive course of the business in a cause, from its commencement to its termination, and apply to proceedings which take place after judgment as well as before, down to the satisfaction of the judgment, including the conduct of the officer in the execution of the process; and this is to conform to the law of the state as it existed in September, 1789.

§ 921. *Lien of judgments of United States circuit court and proceedings to obtain satisfaction are regulated by state laws.*

The act adopts the state law as it then stood, not as it might afterwards be made: that congress intended to legislate as well upon the effect as the form of executions issued upon judgments recovered in the courts of the United

States; that when, by the state law, lands were liable to be taken and sold on executions from the state courts, they were equally liable on executions issued from the courts of the United States.

These cases very clearly and fully decide that congress adopted both the *form* and *effect* of executions as established by the state laws in the year 1789. What was that form and effect in this state at that time? This will depend upon the act of the 19th of April, 1787, which has been referred to. The seventh section of that act directs what the execution shall contain; it in the first place commands the sheriff to take the goods and chattels of the defendant, and if sufficient cannot be found, then to make the debt and damages out of the land and tenements whereof the defendant was seized on the day when such lands became liable to such debt; and it requires that day to be particularly specified in the execution, which is always the day on which the judgment was docketed. The execution, therefore, extends to and operates upon all the lands of which the defendant was seized on that day. And this is its effect, which, according to the cases referred to, congress has adopted by the process acts of 1789 and 1792.

§ 922. *Lands in New York may be sold on execution upon judgment in United States circuit court, and the judgment is a lien from the time it is docketed.*

The judgment, therefore, in this case became a lien on the lands in question on the day it was docketed. And the matter set up in the defendants' plea is no bar to the issuing of an execution against the lands in question. The plaintiff is accordingly entitled to judgment upon the demurrer.

#### UNITED STATES v. HUMPHREYS.

(Circuit Court for Virginia: 3 Hughes, 201-206. 1879.)

Opinion by HUGHES, J.

STATEMENT OF FACTS.—The very able and informing briefs of counsel leave me nothing to do but state the points of the case, and deduce a decision from the authorities which govern it.

The United States obtained a judgment in October, 1877, against Joseph M. Humphreys, late collector of customs at Richmond, and his sureties on his official bond. In January, 1878, Humphreys executed a deed of trust to secure money borrowed through Thomas N. Page, on lands of his lying in the county of Henrico, near the city of Richmond. The United States brings its bill in equity in this court against J. M. Humphreys and other proper parties defendant to subject this land to the lien of its judgment. And the single question in the case before the court is, whether the judgment is of higher dignity than the trust deed, and can be enforced as against the lien of the debt secured by that deed.

The contention of the trust creditor is that the United States lost its lien and the benefit of its priority in time over the deed by failing to docket its judgment in pursuance of the requirement of the eighth section of chapter 182 of the code of Virginia, which provides that "no judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it is docketed" in the county or corporation where the land lies on the judgment docket required to be kept by the clerk of each county or corporation court of the state, either within sixty days next after the date of such judgment, or fifteen days before the conveyance of said estate to the purchaser.

§ 923. *In Virginia judgments obtained in a court of the United States need not be recorded to hold a lien on lands of the defendant.*

I shall first consider the question as if the judgment creditor was a private creditor. The sixth section of the same chapter of the code of Virginia provides that "every judgment for money rendered in this state heretofore or hereafter against any person shall be a lien on all real estate of such person." This provision was first embodied in the code of 1849. Previously to that time, and, indeed, subsequently until March 26, 1872, the writ of *elegit* was in use in Virginia, but on that date that writ was finally abolished by special act of the legislature. Such being the law of Virginia as to the lien of judgments in the state courts, the next inquiry is, how does the law thus existing apply to judgments of courts of the United States rendered in the state of Virginia?

It is well settled law that judgments rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar judgments of the state courts are made liens by the law of the state. *Wood v. Chamberlain*, 2 Black, 430 (§§ 926-29, *infra*); more particularly page 438 *et seq.* Many other decisions of the supreme court of the United States might be cited to the same effect. These judgments are liens, not by virtue of the adoption of state laws by the United States courts, by rules of court or otherwise, but by virtue of acts of congress giving the same effect to final process of United States courts as is given by state laws to process of the courts of the states in which they are held; giving the same remedies on judgments and decrees of federal courts as are given by state laws on judgments and decrees of state courts; and giving authority to the United States courts to make proper rules for securing these objects.

We are therefore to look to acts of congress on this subject to ascertain how far judgments of United States courts in Virginia are liens upon lands. If there had been no such act of assembly as that of March 26, 1872, abolishing the writ of *elegit* in Virginia, it might probably be contended that in Virginia the process act of congress of 1823 is not repealed by the act of congress of June 1, 1872, now section 916 of the Revised Statutes of the United States, and that the writ of *elegit* lies from the United States courts in this state; and that the lien of the writ of *elegit* is, unlike that given by section 6 of chapter 182 of the code, not subject to the condition of docketing the judgment imposed by section 8 of that chapter. But the Virginia law of March, 1872, does abolish the *elegit*, and section 916 of the Revised Statutes, giving the same effect to, and remedies on, judgments of the United States courts as were *then* (1874) given by state law to judgments of state courts, repeals by substitution in Virginia the process act of 1823 as to the *elegit*, whatever it may do in other states, under the particular legislation of those states bearing upon this subject. Decisions of United States courts in other states, seemingly in conflict with this view, were rendered upon the condition of state legislation in those states, and do not necessarily apply to the condition of legislation in Virginia.

The judgment in this case against Humphreys became a lien upon his lands just as it would have become if it had been a judgment of a state court; and the remaining question is, whether by the execution of the deed of trust which Humphreys gave in January, 1878, the judgment "*ceased*" to be a lien under the operation of the nine hundred and sixty-seventh section of the Revised Statutes of the United States, which provides that judgments of United States courts within a state "shall cease to be liens on real estate, etc., in the same

manner and at such periods as judgments of the courts of the states cease by law to be liens thereon."

§ 924. *Rights obtained under an act of congress are not divested by non-compliance with conditions or limitations imposed by state laws.*

I do not doubt that so far as this law shall operate *proprio vigore* in any case — for instance, as a statute of limitations — the lien of a judgment of a United States court would cease just as that of a state court would do under a state statute of limitation; but I am precluded by a current of decisions rendered by courts of the United States from holding that the lien of a judgment of a United States court ceases in the event it is not docketed in accordance with a state law as against a subsequent purchaser without notice. I am precluded from holding that the lien of the judgment in this case ceased in January, 1878, as against the trustee's title under the deed of trust executed in that month by Humphreys.

The decisions of the United States courts have been in nothing more uniform, unvarying and consistent than in holding that where rights once attach under laws of congress adopting laws of the respective states, these rights are not divested by a non-compliance with conditions, restrictions or limitations contained in those very state laws, where a compliance with the latter would depend upon a resort in any way to state officials, or to the machinery of the state judiciary.

The provision of the code of Virginia making a judgment for money a lien upon the real estate of the debtor makes, in the eighth section of chapter 182, an exception in favor of a subsequent purchaser without notice, where the judgment has not been docketed. The process of docketing depends upon the action of an officer of a state court in keeping a docket, and upon that officer's actually docketing the judgment of the United States court when presented.

There is no law of Virginia requiring this officer to docket the judgment of a United States court. He acts strictly in a ministerial capacity, and is not required by any express law to enter such a judgment when presented for such a purpose. Congress, on its part, has not (as I think it should do) by law required clerks of United States courts to keep such dockets in each district as the law of Virginia requires to be kept in each county. So as to other restrictions, exceptions, limitations and conditions which state laws conferring rights insert in the laws conferring them. I think it may be laid down as a rule having few exceptions, that in any case of a law of a state conferring rights upon conditions, or with exceptions, and adopted by congress as operative in that state, wherever the exceptions or conditions depend upon the action of state officers, so that the enjoyment of rights thus once conferred could be defeated or divested by the action, or refusal to act, of a state officer, such a condition or exception in the state law is uniformly held by the United States courts not to limit the rights conferred by the act of congress adopting the state law. This was decided in *Palmer v. Allen*, 7 Cranch, 550-64; *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452-60, *infra*); *United States Bank v. Halstead*, 10 Wheat., 51 (§§ 1461-66, *infra*); *Boyle v. Zacharie*, 6 Pet., 648 (§§ 1473-77, *infra*); and (more particularly in their bearing upon the question now under consideration) *Massingill v. Downs*, 7 How., 760 (§§ 930-32, *infra*); and *Carroll v. Watkins*, 2 Abb. U. S., 474. In these last cases the law of Mississippi, giving the lien in favor of judgments for money, was modified by provisions requiring judgments to be docketed, and making exceptions in favor of subsequent purchasers without notice as against judgments not docketed —

provisions identical in purport with those of Virginia. But the supreme court of the United States held in the former case, that, in states where judgments create liens, a judgment of a United States court has that operation throughout the judicial district in which it is rendered, and any provisions of state legislation modifying the lien of judgments and restricting their operation cannot affect the lien of a judgment of a United States court.

I think the decision of the supreme court in *Massingill v. Downs* is decisive of the question under consideration, and requires me to decide that the judgment of this court rendered in October, 1877, is good against the trust deed executed in January following, and that the lien created by section 916 of the Revised Statutes of the United States, adopting section 6 of chapter 182 of the Virginia code, is not controlled or affected by section 8 of that chapter of the Virginia code. This court has decided that a *lis pendens* in a United States court binds property in litigation, though not recorded and docketed, as required by state law if in a state court. *Rutherglin v. Wolf*, 1 Hughes, 78.

§ 925. *As to lien of judgments in favor of the United States.*

I do not think it necessary to go farther and inquire whether a judgment in favor of the United States has the same force as a judgment in favor of the state of Virginia in this state, and as a judgment in favor of the crown in England. I am inclined to believe on authority, and would so decide if necessary in this case, that judgments in favor of the United States stand on the same principle as those in favor of the commonwealth and of the crown; that they are a lien independently of laws making judgments generally a lien upon the estates of debtors, and do not depend upon those laws. Although the ancient writ in favor of the crown of *extendi facias* is obsolete by mere disuse, having given place to more efficient remedies, yet I imagine that it still lies theoretically; and its theoretical existence is sufficient to establish the liens in this country of judgments in favor of the state and federal governments.

Their precedence over all liens in favor of private persons stands upon such broad maxims as *Salus populi suprema lex*; *Thesaurus regis est pacis vinculum, et bellorum nervi*, and the like. Certain prerogatives of the crown belong in the United States, not only to the state governments, but to that in the United States. Those which belonged to the king in England as *parens patriæ*, as distinguished from those which belonged to his person, survive to the government of the United States in this country. *Dollar Savings Bank v. United States*, 19 Wall., 239. This doctrine is well settled in respect to the state governments; more particularly by *Commonwealth v. McGovern*, 4 Bibb, 62; *Leake v. Ferguson*, 2 Gratt., 436; and *Commonwealth v. Baldwin*, 1 Watts, 54. Authorities might be multiplied if it were necessary.

It might not be necessary, in respect to recent judgments in favor of the United States, to resort to a bill in chancery for the enforcement of them upon real estate. But where they have been standing for any length of time, and junior liens have supervened, I think the proper method of proceeding is the same as would be proper in respects to judgments in favor of citizens,—that is to say, by bill,—and that such a course has been properly taken in this case.

## WARD v. CHAMBERLAIN.

(2 Black, 430-447. 1862.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Northern District of Ohio.  
Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This is a bill in equity, and the case comes before the court on a certificate of division in opinion between the judges of the circuit court of the United States for the northern district of Ohio. According to the transcript the bill of complaint sets forth that the complainants, on the 12th day of November, 1856, upon appeal from the district court of the United States, obtained a decree in the circuit court for the southern district of Ohio for the sum of \$36,000 against the two respondents first named, in a proceeding by libel, filed in the district court on the 27th day of October, 1852, for damages sustained, as alleged in the libel, by means of a collision on the waters of Lake Erie, between the steamer Atlantic, belonging to the libelants, and the propeller Ogdensburg, belonging to the aforesaid respondents, whereby the steamer was sunk and lost. Complainants also allege that the case was taken by appeal to this court, and that the decree of the circuit court was here affirmed; that on the 7th day of July, 1859, when the mandate of this court was received and filed in the circuit court, a joint decree, by the agreement of the parties, was entered there against the original respondents and their sureties on the appeal to this court; that the parties to the last-named decree stipulated and agreed between themselves that the original respondents should make certain payments at stated times on account of the decree, and that if such payments were regularly and punctually made, no execution should issue on the decree, but that they also stipulated and agreed that in default of any such payment as required by the agreement, the complainants might thereupon proceed to collect the amount due and unpaid as they should see fit.

They also allege that two payments of \$1,000 each were duly made under the stipulation and agreement, but that the aforesaid respondents subsequently made default, and when a second default had occurred, the complainants caused execution to issue upon the last-named decree against the goods and chattels, lands and tenements of the respondents in that decree, and delivered the same to the marshal, and that the marshal, finding no goods or chattels of the execution debtors, and for want of such, levied the execution upon certain parcels of land belonging to them, situated in the northern district of Ohio, and which are particularly described in the bill of complaint. Rights and interests in and liens upon the lands are claimed by the other respondents, as the complainants allege, in regard to which they, the complainants, are not particularly advised; and they also allege that the respondents owned the lands levied upon and described in the bill of complaint at and before the time of the rendition of the first-named decree, and have so owned the same ever since that time, and that they have no other lands or tenements in the state, and have no goods or chattels liable to execution.

Prayer of the bill of complaint is for discovery, and that the rights of the parties and the dates and validity of their several liens in respect of the lands may be ascertained, and that the lands may be sold and the proceeds applied, so far as can of right be done, to the payment of the amount due upon the decrees, and for general relief. To the bill of complaint the respondents in the decrees demurred, and the complainants joined in demurrer; thereupon the fol-

lowing questions of law occurred before the court, in regard to which the opinions of the judges of the court were opposed:

1. Whether either of the decrees was a lien upon the real estate of the respondents therein who owned such real estate as aforesaid. 2. Whether an execution can be issued upon a decree in admiralty in Ohio against the lands of the respondents, they having no goods and chattels liable to execution to satisfy the same. 3. Whether the issuing and levying of the execution in this case, as aforesaid, were not nullities, and whether the levy of the execution in anywise bound the lands upon which the same was levied. 4. Whether real estate can be reached by proceedings in chancery to satisfy a decree in admiralty in Ohio, where the respondent has no goods or chattels liable to execution.

§ 926. *Upon a certificate of disagreement, etc., nothing in the record can be considered in this court but the questions certified.*

I. Provision is made by the act of the 29th of April, 1802, that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement may happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the supreme court at their next session to be held thereafter, and shall by the said court be finally decided. 2 Stat. at Large, 156. Such certificate, as has repeatedly been held by this court, brings nothing before this court for its consideration but the points or questions certified, as required by the sixth section of the act. Defective certificates are sometimes sent up, but in such case the court uniformly refuses to certify any opinion, and remands the cause for further proceedings, holding, under all circumstances, that nothing can come before this court, under that provision, except such single definite questions as shall actually arise and become the subject of disagreement in the court below, and be duly certified here for decision. *Ogle v. Lee*, 2 Cranch, 33; *Perkins v. Hart*, 11 Wheat, 237 (CONTRACTS, §§ 1005-9); *Kennedy v. Georgia State Bank*, 8 How., 611. All suggestions, therefore, respecting any supposed informality in the decree or irregularities in the proceedings of the suit, are obviously premature and out of place, and may well be dismissed without further remark, because no such inquiries are involved in the points certified; and by all the decisions of this court matters not so certified are not before the court for its consideration, but remain in the court below to be determined by the circuit judges. *Wayman v. Southard*, 10 Wheat, 21 (§§ 1452-60, *infra*); *Saunders v. Gould*, 4 Pet., 392. Such other matters, undoubtedly, may be brought here for revision by another certificate of division in an opinion like the present, or by an appeal after final judgment, but nothing of the kind is here now for the consideration of the court.

§ 927. *Whenever the decree of a state court is a lien upon real estate, the decree of a federal court in like case is a lien also.*

II. Recurring to the questions certified in the transcript, it is obvious that the first three involve the same general considerations, and present the important inquiries—1. Whether a decree in admiralty for the payment of money, rendered in a federal court, in a suit *in personam* under the circumstances stated, is a lien upon the lands of the respondents in the decree; and, if so, then—2. Whether an execution issued on the same may, for the want of goods and chattels of the execution debtor, be lawfully levied on his real estate. Libelants, under the twenty-first rule in admiralty, adopted at the last



session of this court, may have a writ of execution in the nature of a *feri facias* in all cases of a final decree for the payment of money, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulator. Execution, however, was issued upon the decree described in the bill of complaint in 1860, before the present rule was adopted, and while the old rule adopted in 1845 was in operation. By that rule it was provided that the libellant might, at his election, have an attachment to compel the defendant to perform the decree or a writ of execution in the nature of a *capias* and of a *feri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. Authority was given to the courts of the United States, by the seventeenth section of the judiciary act, to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules were not repugnant to the laws of the United States; and by the seventeenth section of the act of the 2d of March, 1793, additional authority was conferred upon the several courts of the United States to make rules and orders for their respective courts, directing certain prescribed proceedings and other matters in the vacation, and otherwise in a manner not repugnant to the laws of the United States, and to regulate the practice of said courts, respectively, for the advancement of justice, and to prevent delays in the proceedings. 1 Stat. at Large, pp. 83, 335.

Full power and authority were also given to this court by the sixth section of the act of the 23d of August, 1842, to prescribe, regulate and alter the forms of writs and other process to be used and issued in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers, and other pleadings and proceedings, in suits at common law, or in admiralty and in equity, pending in those courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and of proceeding to obtain relief, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts so as to prevent delays and promote the other objects specified in the section. 5 Stats. at Large, 518. None of those provisions, however, authorize this court to adopt rules making judgments or decrees for the payment of money a lien on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by an act of congress. Remarks are to be found in the opinion of the court in *Beers v. Haughton*, 9 Pet., 360, which give some countenance to that theory, but the remarks were not necessary to the adjudication of the matter in controversy, and evidently should be understood as referring to the examples previously mentioned in the opinion of the court, where process had been modified to make it conform to state laws adopted by rule of court. Congress, say the court, may adopt such state laws directly or by substantive enactment, or they may confide the authority to adopt them to the courts of the United States; and the judge who delivered the opinion, in enforcing the proposition, went on to say that the courts may by their rules not only alter the forms, but the effect and operation, of process, both mesne and final, so that it may reach property not before liable, or may exempt property previously subject to such process.

Explained as above, the remarks are perhaps without objection, but it cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish or vary the operation and effect of mesne or final

process upon the property of the debtor in respect to the matter under consideration. Although a lien on land constitutes no property or right in the land itself, still it confers a right to levy on the same to the exclusion of other adverse interests acquired subsequently to the judgment, and when the levy is actually made on the land affected by the lien, the title of the creditor generally relates back to the time of the judgment, so as to cut out intermediate incumbrances. *Conard v. The Atlantic Insurance Co.*, 1 Pet., 443; *Massingill v. Downs*, 7 How., 767 (§§ 930-32, *infra*). Different regulations, however, prevail upon the subject in different jurisdictions, and in some of the states neither judgments nor decrees for the payment of money, except in cases of attachment on mesne process, create any preference in favor of the creditor until the execution issuing on the same has been duly levied on the land. Reference is made to these various regulations as confirming the proposition that rules of court can have no effect to create such a right or to displace it where it has been conferred by the legislature.

§ 928. *The decree of a district court sitting in admiralty is a lien upon land, although the decree operates in personam, provided the decree of the same court when sitting in law or equity would carry the same lien.*

III. Two errors, as was supposed, existed in the old rule, and it was on that account that it was abolished and the new one was substituted in its place. Arrest of the body of the debtor was improperly allowed, and the remedy of the creditor against the property of the debtor was improperly restricted. 5 Stats. at Large, pp. 321, 410; 4 Stats. at Large, 281. Repeal of the old rule corrected one of the supposed errors, and the new rule was adopted to correct the other, so that the practice of the admiralty courts upon both subjects might conform to the existing provisions of law. Such were the views of the court at the time the alteration was made in the rule, but it is insisted by the respondents that decrees in admiralty, although rendered in suits *in personam* and for the payment of money, are not in any case a lien on land under the laws of congress. They do not deny that judgment and decrees in equity for the payment of money are a lien on land in the state of Ohio; nor that, by the laws of congress, such judgments and decrees in the federal courts follow in that respect the laws of the state in which the same were rendered or pronounced.

Argument in support of the first proposition is certainly unnecessary, because it is the subject of express legislation. Code, sec. 421; Swan's Stat., 675. Laws to that effect were passed at a very early period in the history of the state, and they appear to have been continued to the present time. Repeated decisions of this court also have established the doctrine that the lien of judgments and decrees in the federal courts arises out of the adoption of the state laws upon that subject, and that the lien may be considered as a rule of property under the thirty-fourth section of the judiciary act. *Clements v. Berry*, 11 How., 411 (§§ 944-46, *infra*); *United States v. Morrison*, 4 Pet., 124; *Ralston v. Bell*, 2 Dall., 158. To the same effect, also, is the decision of Mr. Justice Grier in *Lombard v. Bayard*, 1 Wall. Jr., 196, wherein he held: "1. That the lien of judgments in the courts of the United States does not result from any direct legislation of congress on that subject. 2. That under the judiciary act, which ordains that the laws of the several states shall be the rules of decision at common law, the courts of the United States" have uniformly adopted the principles of state policy and jurisprudence on the subject of the lien of judgments, so far as the same were applicable, treating them as

rules affecting real property, and its transmission, whether by descent or purchase. Regarding those propositions in the form first stated as settled and undeniable, nothing remains for consideration on this branch of the case except to inquire and ascertain whether or not decrees in admiralty for the payment of money stand upon the same footing as decrees in equity; for if they stand upon the same, then it is clear that the first three questions must be answered in the affirmative, and if not, then they must be answered in the negative.

4. Expressions are to be found in one or more of the cases referred to which countenance the idea that the state laws in respect to the lien of judgments and decrees were adopted by the courts of the United States, but upon a closer examination of the subject it will appear, we think, that those laws are recognized and substantially adopted by the acts of congress regulating process in the courts of the United States. Authority was given to all the courts of the United States by the fourteenth section of the judiciary act to issue writs of *scire facias*, *habeas corpus* and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. Provision was also made by the second section of the act of the 29th of September, 1789, that the forms of writs and executions, except their style and modes of process, should be the same in each state, respectively, as were then used or allowed in the supreme court of the same; but it was provided that the forms and modes of proceedings in causes of equity and admiralty and maritime jurisdiction should be according to the course of the civil law. Power to issue process, mesne and final, was conferred upon all the courts of the United States by the first provision, but the forms of process in suits at common law and the forms and modes of proceedings in equity and admiralty and maritime causes were prescribed by the second. Discrimination was made between suits at common law and suits in equity and admiralty, but the forms and modes of proceedings in the two latter were referred to the civil law. Expiring, as the last-named act did, at the end of the next session after which it was passed, further legislation became necessary, and congress accordingly passed the act of the 8th of May, 1792, confirming the forms of writs, executions and other process then used in the courts of the United States in suits at common law, but declaring, in effect, that the forms and modes of proceeding in suits of equity, and in those of admiralty and maritime jurisdiction, should be according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law. Certain exceptions are specified in the same section, and the whole provision is made subject to such regulations as the supreme court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same. 1 Stat. at Large, 276.

Two cases at least came before this court involving the construction of that provision and its validity. Those cases, among other things, affirm: 1. That the states have no authority to control or regulate the proceedings in the courts of the United States, except so far as the state process acts are adopted by congress, or by the courts of the United States under the authority of congress. 2. That the foregoing provision adopted the forms of writs, executions and other process of the states as existing in 1789, subject to such alterations as the courts of the United States might make, but not subject to alterations since made in the state laws. 3. That the laws of the United States

authorize the courts of the Union so to alter the form of the process of execution then used in the state courts as to subject to execution lands and other property not then subject to execution by the state laws in force at that time. *Wayman v. Southard*, 10 Wheat., 41, 43 (§§ 1452-60, *infra*); *Bank of U. S. v. Halstead*, 10 Wheat., 63 (§§ 1461-66, *infra*). In enforcing the third proposition, Mr. Justice Thompson, in the last case, said it is understood that it has been the general, if not the universal, practice of the courts of the United States so to alter their executions as to authorize a levy upon whatever property is made subject to the like process from the state courts, and under such alterations many sales of land have no doubt been made which might be disturbed if a contrary construction should be adopted. Both of those cases were decided in 1825, and at the same term this court held, in the case of *Manro v. Almedia*, 10 Wheat., 490, that the proceedings in cases of admiralty and maritime jurisdiction, under the before-mentioned process act, were to be according to the modified admiralty practice of our own country, and that it was not a sufficient objection to the issuing of the process of attachment that it had fallen into disuse in the parent country. Such was the state of the decisions of this court when the act of the 19th of May, 1828, was passed. 4 Stat. at Large, 278. Regulation of mesne process is the subject of the first section, commencing with the forms of mesne process in suits at common law in the courts of the United States held in those states admitted into the Union since the date of the first process act. Forms of mesne process in those courts are required to be the same in each of the said states respectively "as are now used in the highest court of original and general jurisdiction of the same." Separate provision is also made in the same section in respect to the forms of mesne process in proceedings in equity and in those of admiralty and maritime jurisdiction. Repetition of those regulations is unnecessary, as they are substantially the same as those of the former act, except that the regulations relate solely to mesne process. Right of imparlance also is made, by the second section of the act, to depend in certain cases upon state laws. Where judgments are a lien upon the property of the defendant, and where, by the laws of the state, defendants are entitled in the courts thereof to an imparlance of one term or more, the provision is that the defendants in actions in the courts of the United States, holden in such state, shall be entitled to an imparlance of one term, showing that it was the intention of congress to prevent a creditor suing in the federal courts from obtaining an advantage over another creditor suing in the state courts. Bearing in mind that the first section of the act under consideration has respect solely to the forms of mesne process in the several courts of the United States, and that the provision specifies and prescribes the source from which the forms of such process shall be derived in suits of admiralty and maritime jurisdiction, as well as in suits at common law and in equity, we come to the examination of the third section of the same act, which provides that *writs of execution* and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the *proceeding thereupon*, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, saving to the courts of the United States in those states in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court.

Courts of justice may construe a legislative provision, but they cannot repeal what is expressly enacted. When congress, in plain and unambiguous

terms, declares that writs of execution on decrees rendered *in any of the courts of the United States*, and the proceedings thereupon, shall be the same as are now used in the courts of such state, it is not possible for this court to hold that the decrees of one of the courts of the United States are not embraced in that provision; especially not, as the very court whose decrees it is said are excluded from the provision is specifically mentioned in the first section of the same act as one of the courts of the United States, and its proceedings there made the subject of special and material regulation. Exclusive original jurisdiction in admiralty and maritime cases is conferred upon the district courts of the United States, but the circuit courts hear such cases on appeal, and, as matter of daily practice, render decrees thereon for the payment of money; and it is not to be doubted, we think, that such decrees are as much within the provision under consideration as decrees in equity; and if so, no reason is perceived why the same rule should not be applied to decrees of a like character rendered in the district courts. Undoubtedly congress intended by that provision to adopt the state laws in respect to the proceedings on final process as they existed at the date of the act, and the effect of the enactment, or one of its effects, was to render judgments and decrees for the payment of money rendered in the federal courts a lien on the land of the debtor in all cases and under like circumstances as when rendered in the courts. Under the earlier process acts this court twice decided that the laws of the states furnished the rule of decision in respect to the lien of judgments and decrees rendered in the federal courts upon the land of the debtor, and since the passage of the act under consideration it has been twice affirmed by this court as a matter of history that the act was passed to confirm the view expressed in those decisions. *Beers v. Haughton*, 9 Pet., 361; *Ross v. Duval*, 13 Pet., 64.

Perfect coincidence of opinion upon the subject appears to have prevailed throughout between congress and the court, and on all sides apparently the endeavor has been to assimilate the proceedings in the federal courts for the levying of executions issued on judgments and decrees for the payment of money to those prevailing in the courts of the states. Strong confirmation as to the views of congress upon the subject is derived from the fourth section of the act of the 4th of July, 1840. 5 Stat. at Large, 393. By the fourth section of that act it is provided that judgments and decrees hereafter rendered in the circuit and district courts *within any state* shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such state now cease by law to be liens thereon. District courts, as is well known, exercise no jurisdiction in equity; so that the inference is a very strong and indeed a conclusive one, that the reference to decrees, so far as that court is concerned, is solely to decrees in admiralty for the payment of money.

Imprisonment for debt also, and the computation of interest upon judgments in all civil cases, both in the circuit and district courts, are by acts of congress expressly referred to the laws of the state for the rule of decision and the ascertainment and the rights of the parties. 5 Stat. at Large, pp. 320, 410, 515. Usage, however, it is said, is opposed to such a construction of the provisions under consideration, and reference is made to authorities to show that in England an execution issued on a decree in the admiralty never runs against the land of the debtor, which may well be admitted; but the reason for the restriction must not be overlooked, which is, that courts of admiralty in that country are not regarded as courts of record. Under the constitution, the

judicial power of the United States is vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. Such judicial power extends to all cases of admiralty and maritime jurisdiction, as well as to the cases of law and equity described in the constitution.

When the judicial system of the United States was organized, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction was conferred upon the district courts. Appeals in certain cases were allowed to the circuit court, but neither an admiralty nor an equity cause could be brought here from the circuit court in any other mode than by writ of error. 1 Stat. at Large, 83. Later regulations allow appeals, but they place causes in equity and admiralty and maritime jurisdiction upon the same footing. 2 Stat. at Large, 244.

Circuit courts, as well as district courts, were created by the act of congress establishing the judicial system of the United States, and the latter as well as the former are courts of record. No one doubted the fact, and consequently it is not necessary to enter into any argument to prove it. These considerations lead necessarily to the conclusion that the answer to the first three questions must be in the affirmative.

§ 929. *A bill in equity will lie to remove clouds from the title to land levied on by an execution issued in an admiralty cause.*

5. Before proceeding to answer the fourth question submitted, it becomes necessary to advert very briefly to the state of facts bearing upon the point as exhibited in the transcript. Execution was issued on the decree in favor of the complainants, and the marshal duly levied the same upon the several parcels of land described in the bill of complaint. They are, therefore, interested in the title to the subject-matter in controversy, and inasmuch as the statement of the case shows that rights and interests in and liens upon the lands of a conflicting character are claimed by the other parties, they, the complainants, were entitled to the discovery and to so much of the relief prayed for as has respect to the ascertainment and determination of the rights and interests of the parties and the dates and validity of their liens upon the said lands. Equity will not allow a title to real estate, otherwise clear, to be clouded by a claim which cannot be enforced either at law or in equity, and consequently will interfere in behalf of the holder of the legal title to remove a cloud on the same, or an impediment or difficulty in the way of an effectual assertion of his rights in a court of law. Such interference cannot be sustained unless the complainant show some title or interest in the land; but it makes no difference whether such title or interest was acquired by the levy of an execution issued on a judgment at law, or on a decree in equity or admiralty for the payment of money. Complainant's rights and remedies are precisely the same as they would have been if the execution levied on the land had been issued on a judgment at law or a decree in equity for the payment of money. Jurisdiction in equity to remove a cloud from the title of the complainant is fully maintained by the modern decisions of the courts, and so generally is the principle acknowledged, that all doubt upon the subject may be considered as put at rest. 1 Story, Eq. (8th ed.), secs. 700, 705; *Hamilton v. Cummings*, 1 John. Ch., 522; *Pettit v. Shepherd*, 5 Paige, Ch., 501.

Where the respondents claimed an unfounded lien on certain real estate of the complainant, and it appeared that such claim prevented purchasers of the estate from making payment of the stipulated price, it was held in *Chipman*

*v. Hartford*, 21 Conn., 488, that the complainant was entitled to a discovery and to have the cloud removed from his title; and, in enforcing that conclusion, the court say that where an instrument is outstanding against a party which is void, or an unfounded claim is set up, which he has reason to fear may at some time be used injuriously to his rights, thereby throwing a cloud over his title, it is a well-recognized principle that equity will interfere and grant the appropriate relief. *Downing v. Wherin*, 19 N. H., 91; *Tanner v. Wise*, 3 P. Wms., 296; *Overman v. Parker*, 1 Hemp., 692; *Clark v. Smith*, 13 Pet., 203; *Lounsbury v. Purdy*, 18 N. Y., 515. Applying these principles to the present case, it is clear that the complainants were entitled to a discovery and to have the cloud removed from their title, but equity will not interfere, under the circumstances stated, to decree that the lands shall be sold and the proceeds applied as prayed in the bill of complaint. Affirmative answers must be certified to the first three questions, and to the fourth that the complainants, under the demurrer, are entitled to so much of the relief prayed for as has respect to the removal of the cloud upon their title to the land described in the bill of complaint, but that the real estate mentioned cannot be reached by proceedings in chancery to satisfy the aforesaid decree.

JUSTICES GRIER and CATRON dissented, holding that a decree in admiralty is not a lien upon land.

MASSINGILL *v.* DOWNS.

(7 Howard, 760-768. 1848.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—This action was brought in the circuit court of the United States for the southern district of Mississippi, to try the right of property which had been levied on. The plaintiffs showed a judgment of the circuit court, entered the first Monday of November, 1839, for \$3,716.43, with interest, etc., against one J. J. Chewning and others, on which an execution had been issued and levied upon certain slaves claimed by A. C. Downs. At the time of the levy the property was in possession of the defendant Chewning. Downs produced a mortgage on the slaves, executed by said Chewning, and regularly recorded, in favor of the "Commercial Railroad Bank of Vicksburg," to show a title in the bank adverse to the right of the plaintiffs. This mortgage bears date subsequent to that of the judgment.

On these facts the court were requested by the plaintiffs to charge the jury "to disregard the mortgage, because of the paramount right of the plaintiffs to have execution of their judgment by means of said levy, although no abstract or brief of the judgment had been recorded or enrolled in the county where the property was situated." And on this prayer for instruction to the jury, the opinions of the judges were opposed; and, at the request of the counsel on both sides, the point was certified to this court.

By the first section of the act of Mississippi of February 6, 1841, it is provided that "all judgments and decrees of any circuit, district or superior court of law or equity, holden within this state, shall operate as liens from the date of their rendition upon the property of the debtor, being within the county in which the sitting of such court may be holden, and not elsewhere, unless upon compliance with the conditions hereinafter enacted."

By the second section: "That any judgment or decree heretofore rendered shall be a lien from the date of its rendition upon the property of the debtor, situated in any other county than that in which the same was rendered, on condition that an abstract thereof, on or before the 1st day of July next, be filed in the office of the circuit court of the county in which said property may be situate, in pursuance of the subsequent section of this act."

The third section provides that where an abstract of a judgment or decree is filed in the office of the clerk of the circuit court, which it is made his duty to record, it shall be a lien on the property of the defendant within the county from the time of such filing.

The judgment under which the levy was made was rendered more than a year before the above act was passed. Prior to the act of 1824, there was no statutory lien of a judgment in Mississippi. A lien was created in that state, as in England, by the delivery of the execution to the sheriff. The statute of Westm. 2, or 13 Ed. I., ch. 18, gave the *elegit* which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 Salk., 212; 1 Wils., 39.

"There is no statute in Virginia, which, in express terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*." *United States v. Morrison*, 4 Pet., 136. And in *The Bank of the United States v. Winston*, 2 Brock., 252, the chief justice says: "The lien depends on the right to sue out an *elegit*." The same doctrine was held by the supreme court of Indiana before the act of 1818, of that state, which gave a lien on the real estate of the defendant by the judgment. *Ridge v. Prather*, 1 Blackf., 401. In North Carolina, the lien on lands is created by the delivery of the execution to the sheriff, there being no statute in that state on the subject. And in other states of the Union the same principle has been long established.

Now in all these cases the lien arises from the power to issue process to subject real estate to the payment of the judgment, either by an extension or sale. In Maryland this rule has been extended by long usage, so that alien is created by the judgment without execution. *Tayloe v. Thomson*, 5 Pet., 369. The circuit courts of the United States exercise jurisdiction co-extensive with their respective districts. And it has never been supposed that, by the process act of 19th May, 1828 (4 Stat. at Large, 278), which adopted the process and modes of proceeding of the state courts, the jurisdiction of the circuit courts was restricted. The "process and modes of proceeding" in the state were adopted by congress in reference to the jurisdiction of the circuit courts, and not with the view of limiting the jurisdiction of those courts.

§ 930. *Judgment of a federal court is a lien to the extent of the jurisdiction of the court.*

In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts.



§ 931. — *and a state law cannot affect a judgment rendered before its passage.*

That, by the course of practice in Mississippi, the lien of a judgment in the circuit court extended throughout the district, prior to the act of 1841, is not controverted. And the question is, whether that act can impair or affect in any respect a judgment rendered in the federal court before its passage. The point certified does not require us to consider whether the law can operate on judgment liens entered subsequent to its date. The plaintiffs in the above judgment acquired a right under the authority of the United States, and that right may be protected from any judgment of the supreme court of the state which shall impair it, under the twenty-fifth section of the judiciary act. 1 Stats. at Large, 85.

It is contended that the lien in Mississippi exists by the statute of the state, and that, under the thirty-fourth section of the judiciary act of 1789, it is a rule of property, and that it is consequently a rule of decision for the courts of the United States, and that the process act of 1828 has no bearing upon the question. The above section provides that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply."

No state statute is of more frequent application in the federal courts than the above section, and it has often been held that the settled construction of a state statute by its supreme court is considered as a part of the statute. And the statute, as thus expounded, is regarded as a rule of decision in the courts of the United States where it applies, "except where the constitution or acts of congress otherwise provide." The thirty-fourth section has never been considered as an act to regulate process. And it is argued that a statutory lien, being a rule of property, is applied to judgments in the circuit courts, under this section, without being influenced, in any degree, by the process act.

We have seen that where there is no statutory lien it is created by issuing and delivering to the sheriff an execution, which authorizes the sale or extension of the real estate of the defendant. In those states it is the process authorized by the judgment which creates the lien, and in such cases we necessarily look to the nature of the process, and the extent of its operation, to determine the lien. It must act upon the land of the defendant, and consequently the land must lie within the jurisdiction of the court.

§ 932. *Nature of a judgment lien.*

What is a judgment lien? In the argument it was compared to a mortgage. "A mortgage is often called a lien for a debt, but it is something more. It is a transfer of the property itself as security for the debt. This is true in law and in equity." *Conard v. Atlantic Ins. Co.*, 1 Pet., 441. A judgment lien on land constitutes no property or right in the land itself. "It only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, to cut out intermediate incumbrances." Subject to this charge, the defendant may convey the land. "A judgment creditor has no *jus in re*, but a mere power to make his general lien effectual by following up the steps of the law." What law? The law which authorizes the judgment, and the issuing of the process through which means the judgment may be satisfied. A failure to do this releases the charge on the property. *Ibid.*

The lien, if not an effect of the judgment, is inseparably connected with it. And this is the case whether the lien was created by the judgment and execution or by statute. And in either case, where the right has attached in the courts of the United States, a state has no power, by legislation or otherwise, to modify or impair it. Retrospective laws of a remedial character may be passed, but no legislative act can change the rights and liabilities of parties which have been established by a solemn judgment.

This court therefore direct that it be certified to the circuit court that the right of lien claimed by the plaintiffs under the judgment is paramount to that of the defendant claimed under the mortgage.

LUDLOW v. CLINTON LINE RAILROAD COMPANY.

(Circuit Court for Ohio: 1 Flippin, 25-34. 1861.)

Opinion by WILSON, J.

STATEMENT OF FACTS.—This case was referred to a master in chancery to inquire and report whether the defendant Patrick Lavin, by a judgment rendered in this court at the July term, for \$24,640 and costs, against the Clinton Line Railroad Company, obtained a lien upon the lands of said company, and if so, to what extent. The master, on the 5th of January, 1861, filed his report, in which, without giving any reason for his conclusion, he says that the judgment of said Lavin is not a lien upon any part of the lands of said railroad company.

To this report the counsel for Lavin have filed exceptions on the ground that the finding of the master is erroneous and contrary to law, in this: (1) In finding and declaring said judgment *not to be a lien* on said company's land; and (2) in his failing to find and declare said judgment to be a lien prior and superior to the complainant's mortgage upon all of said company's land situate in the counties of Portage, Geauga and Trumbull.

It appears from the record in this case that the cause of action upon which Lavin recovered his judgment against the company was for work and labor in grading the road-bed; for constructing culverts and furnishing materials for the same, and generally for labor and materials furnished in preparing the road of said company for its iron track. The judgment was rendered in July, 1856, and execution issued on the 19th of April, 1859, and was levied upon lands belonging to the company situate in the counties of Portage, Geauga and Trumbull.

The complainant has brought this suit in equity to foreclose a mortgage given by said railroad company to him as trustee for the security of certain creditors, holders of the bonds of the company, which bonds are accurately described in the trust deed. This mortgage covers, in its terms, the road and real estate of the corporation. It was recorded in the county of Summit, on the 3d day of October, 1855. But it was not received for record, or recorded in the counties of Trumbull, Geauga and Portage, until 1857, and after the rendition of said judgment in favor of Lavin.

The Clinton Line Railroad Company is a corporation organized under the act of the general assembly of Ohio, passed May 1, 1852. Its *termini* are fixed and established in the town of Hudson, in the county of Summit, and a point in the Ohio and Pennsylvania state line, in the county of Trumbull. The road has been surveyed and located on a route running through the counties of Summit, Portage, Geauga and Trumbull. Only a portion of the entire

line of the road-bed has been graded; no iron rails have been placed upon it, and no equipments have been acquired by the company for operating the road. It seems to be admitted by all parties that the corporation has abandoned the project of completing the road; that it is insolvent, and that its property must be sold to pay its debts.

This, then, is a contest between creditors for a priority in the distribution of the fund to arise from the sale of the property belonging to an insolvent railroad corporation, whose road cannot be finished and operated by a receiver. And the question is: Does the judgment of Lavin operate as a lien upon the lands acquired by the company, for the construction and operation of its road, and upon the road itself?

In determining this question of lien we are to be governed by the laws of the state of Ohio, and the construction given to those laws by the supreme court of the state. The four hundred and twenty-first section of the Ohio Code of Civil Procedure provides that "the lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered." Swan's Stat., 675.

§ 933. *A judgment of the circuit court of the United States has the same effect as a lien on lands throughout the judicial district as a judgment of a state court throughout the county.*

The limits of a federal judicial district (in the exercise of the jurisdiction of the United States circuit court) is as the limits of the county to the local courts. The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, as they are made to operate throughout a more extended jurisdiction. In *Sellers v. Corwin*, 5 Ohio, 400, the supreme court of Ohio decided that the *lien* of a judgment in the circuit court of the United States was co-extensive with the territorial jurisdiction of the circuit court. This effect and extended operation of judgment *liens* in the federal courts is equally as well established in other states. Wall. Jr., 196; 2 Paine, 251 (§§ 915-22, *supra*); 2 McLean, 98.

The *lien*, therefore, of a judgment rendered in this court has the same effect, and operates to the same extent upon the debtor's land throughout the northern district of Ohio, as the *lien* of a like judgment, rendered in the state court, operates upon the debtor's land in a county. The language of the statute is clear and explicit, that the land and tenements of the judgment debtor shall be bound for the satisfaction of the judgment.

§ 934. *The lien of a judgment on a railroad and its realty is the same as upon the real estate of a natural person.*

Ordinarily such lien attaches only to lands in which the debtor has the legal title. But by the judgment of the highest judicial tribunal of the state, a railroad and the lands necessary for its operation (by whatever title such lands are held), together with the franchise of maintaining the road and demanding compensation for the transportation of passengers and property, *constitutes real estate* — possessing the unity and character of a tract of land, and, as such, is subject to appraisal and the other incidents of a judicial sale of land. If this doctrine is correct, we do not see why the judgment lien is not effectual on such property, and secures to the creditor a right equal to that of a mortgagee, whose security on such railroad property is obtained by the voluntary act of the debtor corporation.

It has, however, been urged by counsel, that insolvent railroad corpora-

tions furnish exceptional cases, not by reason of any general law of the state, or by virtue of any exemption in the law of their creation, but solely upon considerations of public policy. And the case of *Coe, Trustee, etc., v. The Columbus, Piqua & Indiana R. R. Co.*, decided last April by the supreme court of Ohio, is cited by counsel as an authority for the doctrine.

When a statute of Ohio has been interpreted or construed by the supreme court of the state, such interpretation or construction is followed and adopted by this court, if not in conflict with the constitution and laws of the United States. The case of *Coe, Trustee, etc.*, involves the construction of the act of the Ohio legislature of February 11, 1848, in relation to the powers and liabilities of railroad corporations organized under its provisions.

The Clinton Line Railroad Company derives its powers from the act of May 1, 1852. The fifteenth section of this law provides that "such company may acquire by purchase or gift any lands in the vicinity of said road, or through which the same may pass, so far as may be deemed *convenient* or necessary by said company to secure the right of way, or such as may be granted to aid in the construction of such road, *and the same to hold or convey* in such manner as the directors may prescribe," etc. And the third section of said act, among other things, provides that said railroad company shall have power to contract and be contracted with, to sue and be sued, to acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation.

The first and fourteenth sections of the act of February 11, 1848, contain, substantially, the same provisions as are embraced in the third and fifteenth sections of the act of May 1, 1852. Hence, the construction which the supreme court of Ohio has given to the act of 1848 must be deemed the true and authoritative construction which should be given by this court to the act of 1852, in cases where that construction properly applies. But the case of *Coe v. The Columbus, Piqua & Indiana Railroad Company* is distinguishable from the case before us in many important particulars. That was a proceeding in equity to foreclose a mortgage, given by the railroad company upon its entire property, to a trustee, for the benefit of bondholders. The company at the time of the commencement of the suit had finished the construction and equipment of the road, and was operating the same in the transportation of freight and passengers. The relief asked for was a sale (under an order of court) of the entire road, including the real and personal property of the corporation with its franchises.

§ 935. *A railroad held to be an entire tract of land lying in several counties, so far as lien and sale are concerned.*

The court held that under the general powers conferred by the act of February 11, 1848, the company had no authority to alienate the franchise "to be a corporation;" but that the railroad, with its fixtures, constituting an entire tract of real estate — (indivisible for the purpose of sale) together with certain franchises connected therewith, should be sold in like manner as an entire tract of land lying in two or more counties.

In that case there was no substantial question in relation to conflicting liens between judgment creditors and mortgagees. It is true, it appeared that one Hilliard had recovered a judgment against the company, for money advanced, and had levied execution upon a part of the railroad, rails, superstructure, etc. But the recovery by Hilliard of his judgment, and the levy of the execution, were transactions subsequent in time to the giving and recording of

the mortgage, and after the commencement of the suit for foreclosure, and while the road and all the property of the corporation were in the hands of the receiver, appointed by the court. The property of the company was thus placed in the custody of the law, and when so held by its proper officer it could not be the subject of a judgment lien or levy of an execution.

Yet it was urged that inasmuch as the consideration of the debt for which Hilliard obtained judgment was for money advanced in the payment of interest and taxes, and for the right of way, he had an equitable claim as against the mortgagee; and the learned judge who delivered the opinion of the court said, "those who advance money or sell on credit to the directors of the company are bound to take notice of the claim which will arise under the mortgages, which are required by law to be recorded in each of the counties through which the road passes. If they part with their money or property without taking security, we know of no principle upon which one can be created for their benefit. We are not inclined to exempt the company or the mortgagees from the application of any rule of law which could properly apply to the dealings between them, or to property which is the subject of those dealings, and which would secure or protect the just claims of third persons."

What effect the court would have given to Hilliard's judgment had it been obtained previous to the execution and recording of the mortgages, we are left to conjecture from what is said in another part of the same opinion. The learned judge says: "It may be true that a railroad corporation holds its property in a certain sense, as a public trust, to answer the purpose of a public highway for the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involved obligations to individuals, and to meet those obligations the property of the corporation must in some form be liable. The question is, In what form? Shall it be in the ordinary legal form applicable to the property of individuals, or shall peculiar rules be introduced, which may have the effect to delay creditors and operate as a shield to protect property from their just demands?"

Again he says: "We are satisfied that it is not the policy of the state, nor just to individuals, that the power of a court should be invoked to enable an insolvent corporation to operate a railroad, by protecting its property from the claims of creditors, of those who have performed for it labor, or have suffered loss or sustained injuries by the misconduct of its agents. We think the true policy of the state requires that just demands should be met, and that the property of those against whom they exist should be applied for the purpose."

The supreme court of Ohio, in the case referred to, fully approve of the well established principle that the mere grant to a body corporate, in the absence of any restriction, gives the right to acquire and dispose of real estate; and in such case a corporation may be regarded as occupying the position of an individual owner of land. There is the same voluntary alienation and a like liability to involuntary alienation. What a corporation can convey its creditor may subject. We can see nothing in the railroad policy of the state, as interpreted by the supreme court, or in the act of May, 1852, which should exempt from judgment liens the lands and road owned by the Clinton Line Railroad Company.

Its power to pledge lands, by way of mortgage to pay creditors, implies the right of a creditor to subject such lands, by legal proceedings, to the payment

of its debts. The law of its charter confers the power to acquire lands, and "the same to hold and convey in such manner as the directors may prescribe." The power to convey is without any restriction as to mode or purpose. In that respect the corporation has all the freedom of action which belongs to natural persons. Its power of alienation, therefore, whether voluntary or involuntary, should be subject to the incidents which attach to individuals. With this view of the case, we are clearly of the opinion that the lands and road of the Clinton Line Company are subject to the operation of the general law of the state, which law declares that the lands and tenements of the judgment debtor shall be bound for the satisfaction of the judgment.

§ 936. *A railroad for purposes of sale under execution or mortgage is indivisible.*

The next question is, how may Lavin enforce his judgment lien? or, in other words, in what way can it be legally made available to him? It is against the declared policy of the state to disintegrate a line of railroad by a sale of a portion of the land over which it runs. The whole road and the land necessary for its operation, together with the franchises of the corporation to maintain the railroad and demand compensation for the transportation of passengers and property, must be sold, and for the purposes of the sale such property is to be considered as one tract of land lying in different counties, and subject to appraisal and the forms of law usual in other cases of a judicial sale of lands. The proceeds of the sale will be brought into court for distribution according to priority of liens. This course of procedure is the one established by the supreme court of the state in relation to the sale of railroads, and one which we do not feel at liberty to vary in this case.

§ 937. *Where a mortgage is recorded in one of several counties through which the railroad runs, its lien is as to judgment creditors confined to the portion of road lying in the county in which the mortgage was recorded.*

The complainant having caused his mortgage to be recorded in the county of Summit before Lavin obtained his judgment, the mortgage has priority over the judgment upon the road and lands of the company situate in that county. But, as the complainant failed to record his mortgage in the counties of Portage, Geauga and Trumbull, until after the rendition of the judgment, the judgment has priority over the mortgage upon the road and lands of the company in those counties. There must be separate appraisals of the two portions thus designated, but the entire road and lands may be sold as one tract at not less than two-thirds of the aggregate appraisal. The exceptions to the master's report are sustained.

CARROLL v. WATKINS.

(District Court for Mississippi: 1 Abbott, 474-482. 1870.)

Opinion by HILL, J.

STATEMENT OF FACTS.—This is a bill filed by the complainants against Watkins, assignee of Moore, praying that the lands surrendered by Moore shall be sold and the proceeds applied to the payment of their judgment against Moore, recovered in the circuit court of the United States for said district. The other defendants filed their petitions, praying to be made parties to this cause; and that said lands be sold and the proceeds applied to the payment of their judgments obtained in the circuit court of this state for the county of Scott. The judgment of complainants was obtained prior to those of the defendants—the

creditors in the judgments in Scott circuit court—but was not enrolled in the county of Scott, where the land is situated. The judgments in the Scott circuit court were duly enrolled in said county before Moore filed his petition to be declared a bankrupt.

§ 938. *Enrollment and lien of judgments; priority.*

The only question presented for decision is whether or not the judgment of complainants, not being enrolled, constituted a lien on the lands described in the pleadings; if so, their judgment being prior in date must first be satisfied; and the residue, if any, applied to the payment of the judgments obtained in the Scott circuit court. This is one of those vexed questions which occasionally arise between the national and state tribunals, and in which each claims the enforcement of rights emanating under the constitution and laws of the power of its own creation. In this state this conflict commenced with the case of *Tarpley v. Hamer*, 9 Sm. & M., 310, and continued by the case of *Bonafee v. Fisk*, 13 id., 589; and *Brown v. Deacon*, 27 Miss., 682; and in the supreme court of the United States in the case of *Massingill v. Downs*, 7 How., 760 (§§ 930–32, *supra*).

Were it conceded that the lien of judgments rendered in the federal courts depends upon the legislation of the state or the construction given to it by the courts of the state, the controversy would be at an end. The judgment of complainants would have no effect as a lien upon the lands of the bankrupt, there being no evidence that an execution was ever issued and placed in the hands of the marshal to be levied. For in addition to the repeated decisions of the high court of errors and appeals of the state, the legislature, by the provisions of the code of 1857, page 525, article 262, declare in express terms that no judgment or decree rendered in any court of the United States shall be a lien upon or bind any property of the defendants situated out of the county in which said judgment or decree is rendered, until the plaintiff shall file in the office of the clerk of the circuit court of the county in which the property may be situated, an abstract of such judgment or decree, certified by the clerk of the court in which the same was rendered, containing the names of the parties to such judgment or decree, its amount, and the amount appearing to have been paid, if any, etc.

Then in article 263 of the same chapter, and on the same page, it is further provided that no judgment or decree rendered in any court of the United States shall be a lien upon or bind the property of the defendants in the county in which the judgment is rendered, unless the abstract of the judgment is filed and enrolled as provided in article 262. Thus it is seen that so far as the legislative will of the state and the judicial mind of the highest tribunal of the state can settle the question, it has been unmistakably done.

The same result would follow if this question were to be governed by section 34 of the judiciary act of 1789, which provides that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.”

Having given the statutes and decisions of the courts of the state on this question, the next point of inquiry is to ascertain what is the law of the United States on this question, as settled by the courts thereof.

The only case decided by the supreme court of the United States, arising in this state, is the case of *Massingill v. Downs*, 7 How., 760 (§§ 930–32, *supra*).

In that case the judgment claimed as a lien was obtained in the circuit court of the United States for the southern district, on the first Monday in November, 1839, before the passage of the abstract act, as it was called, of 1841. This act restricted the judgment liens to cases in which an abstract of the judgment should be filed in the office of the clerk of the circuit court of the county in which the property was situated, and making its provisions apply to all cases in which judgments had already been rendered, unless the abstract should be filed on or before July 1, 1841. The main question decided was, did that act destroy or make void the lien created by the judgment rendered before its passage? The court held that it did not. The judge, in delivering the opinion of the court, states that the lien, if not an effect of the judgment, was inseparably connected with it, whether the lien was created by the execution and judgment or the statute; and in either case where the right has attached in the courts of the United States, a state has no power, by legislation or otherwise, to modify or impair it. It is true that Justice McLean, in delivering the opinion of the court, does say "that the point certified does not require us to consider whether the law can operate on a judgment being entered subsequent to its date;" but the whole reasoning given in the opinion goes to show that, had the question arisen on a subsequent judgment, the result would have been the same. The judgment lien in that case was held to grow out of the process act of 1828; that that act was not controlled by section 34 of the judiciary act of 1789. The process act of 1828 remains unchanged in the southern district of Mississippi. There has been no act of congress changing it, nor has there been any rule of court changing or in any way modifying it. The act of the legislature of this state, passed in 1834, making all judgments liens from their rendition, was in force when the process act of 1828 was passed by congress.

The opinion of the court further states "that the circuit courts of the United States exercise jurisdiction co-extensive with their respective districts, and it has never been supposed that by the process act of May 19, 1828,—which adopted the process and modes of proceeding in the state courts,—the jurisdiction of the circuit courts was restricted. The process and modes of proceeding in the state courts were adopted by congress in reference to the jurisdiction of the circuit courts, and not with the view of limiting those courts."

§ 939. *Judgment of federal court a lien to the extent of the jurisdiction of the court.*

In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than those in the federal courts. That the decisions of the supreme court of the United States give to judgments rendered in the federal courts a lien upon the property of the defendant whenever situated in the district in this state, without enrollment, is admitted in the opinion of the court in the case of *Brown v. Bacon*, 27 Miss., 589. That the state legislature can pass no law binding on the courts of the United States, or giving effect to or changing the judgments or decrees rendered therein, was distinctly settled



by the supreme court of the United States as early as 1825. In the very able opinion of Chief Justice Marshall, in the case of *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452-60, *infra*), the chief justice, in delivering the opinion of the court, uses this strong and pointed language: "That it has not an independent existence in the state legislature is, we think, one of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused." The proposition has not been advanced by counsel in this case, and will probably never be advanced. Its utter inadmissibility will at once be presented to the mind, if we imagine an act of the state legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficiency of such an act. It seems not much less extravagant to maintain that the practice of the federal courts and the conduct of their officers can be indirectly regulated by state legislatures by an act professing to regulate the proceedings of the state courts and the conduct of the officers who execute the process of those courts. It is a general rule that what cannot be done directly from defect of power cannot be done indirectly."

In the case of *Bank of the United States v. Halstead*, 10 Wheat., 51 (§§ 1461-66, *infra*), it is held that the act of the assembly of Kentucky, which prohibits the sale of property taken under executions for less than three-fourths its appraised value, without the consent of the owner, does not apply to a *venditioni exponas* issued out of the circuit court of the United States for Kentucky. The question again came before the supreme court in 1862, in the case of *Ward v. Chamberlain*, 2 Black, 430 (§§ 926-29, *supra*), in which it is held that, under the process act of 1828, a decree of the district court of the United States, sitting in admiralty in the state of Ohio, is a lien upon the lands of the defendants. Justice Clifford, in delivering the opinion of the court, gives the following as the settled rules of that court: "That the states have no authority to control or regulate the proceedings in the courts of the United States, except so far as the state process acts are adopted by congress, or by the courts of the United States under the authority of congress."

Other decisions made by the supreme court of the United States, bearing upon the question, might be cited, but it would extend this opinion to too great a length.

Almost the identical questions now presented came before the United States circuit court for the district of Indiana at the May term, 1840. In that case the judgment, which was the foundation of the plaintiff's action of ejectment, was obtained at December term, 1827, of said court; no copy of the judgment was filed with the clerk of the county in which the real estate was situated, as required by the laws of Indiana. The defendant claimed title, under the sheriff's deed, upon a junior judgment in the state court of the county in which the real estate was situated, which, it was admitted, was a lien only as against plaintiff's title from the marshal under his judgment. Justice McLean, in delivering the opinion of the court, held that, by force of the process act of 1828, a lien was created by the defendant's judgment, without any statute directly conferring it. That the act of 1831 of that state, limiting the liens of judgments to those rendered in the county in which the judgment was rendered, or in which a copy of the judgment was filed, could not annul or impair the lien created by the plaintiff's judgment under and by force of the process act of 1828, and that the jurisdiction of the federal courts is co-extensive with

the limits of the state of Indiana, and consequently the liens of its judgments extend throughout the state.

§ 940. *Judgments of United States courts are liens on property of defendant within the district.*

From a careful examination of the decisions of the courts of the United States, I am satisfied that the holding is that judgments or decrees rendered in the courts of the United States become liens on the property of the defendant situated in the district in which the judgment or decree is rendered, subject only to prior liens thereon from the date of the rendition, without reference to any law of the state not adopted by congress or the courts of the United States under congressional authority.

I am further satisfied that such ruling is correct, upon principle, and whether satisfied of the correctness of the principle or not, it being so settled by the supreme court of the United States, it is my duty to adopt it; and, so holding, must declare the complainants entitled to a prior lien on the lands stated in the bill, which will be sold as other lands under the rules of this court in like cases, and the proceeds, so far as necessary, applied, first, to the payment of complainant's judgment; and then, if any surplus shall remain, to the judgments obtained in the circuit courts of Scott county in their order of priority. Decree accordingly.

TAYLOE v. THOMSON.

(5 Peters, 358-372. 1831.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—In the court below this was an action of ejectment, brought by Thomson, to recover possession of a lot in the city of Washington. It came upon a case stated by the parties, which contains all the facts on which the cause depends, and is as follows:

In this case it is agreed "that one Charles Glover was seized in fee of the messuage, etc., in dispute, on and before the 15th May, 1815, and so continued seized until the 4th January, 1819, when he bargained and sold the premises to the defendant, John Tayloe, as hereinafter mentioned; that on the 15th June, 1818, Owen and Longstreth obtained two judgments at law against the said Glover, as indorser of two promissory notes, passed to the said Owen and Longstreth; the one for \$680.74, with interest from the 15th February, 1817, till paid, and costs; the other for \$674.20, with interest from the 15th December, 1816, till paid, and costs; which judgments, by an arrangement between said Owen and Longstreth, and the lessor of the plaintiff, or the lessor of the plaintiff together with his partner, Maris, trading under the firm of Thomson and Maris, were transferred, with other *choses in action*, by Owen and Longstreth, to the lessor of the plaintiff, or to said Thomson and Maris, so as to place the proceeds of said judgments at the disposal of said Thomson, or Thomson and Maris, and make the same applicable to the security of said Thomson, or Thomson and Maris, against certain engagements entered into by him or them for Owen and Longstreth; and were prosecuted for the benefit of said Thomson, or Thomson and Maris. "That *ca. sas.* were issued on said judgments on the 10th May, 1820, returnable to June term, 1820, and duly served on said Glover, who was duly committed to the jail of the county aforesaid under the said execution. That he was thereupon admitted to the

benefit of the prison rules, upon giving bonds and securities, pursuant to the act of congress (2 Stats. at Large, 241) in such case provided. That the said Glover having broken the prison rules and the conditions of his said bonds, suits were brought upon the same, against him and his security, returnable to October term, 1822, at the instance and for the benefit of the said assignee or assignees of the said judgments; and judgments were duly obtained in said suits against said Glover (but not prosecuted to judgment against his security, he having died, and no administration on his estate in this district), for the respective amounts of said original judgments, with interest and costs, at October term, 1823; upon which judgments so obtained against Glover, on said prison-bonds bonds, *fi. fas.* were duly issued, returnable to December term, 1824, and then returned *nulla bona*. That at the same term, of December, 1824, the attorney upon the record of the said Owen and Longstreth, still acting at the instance and for the benefit of the said assignee or assignees of the said original judgments, moved the court to recommit the said Glover, under the original *ca. sas.* issued on said judgments and before execution as aforesaid; the ground of which motion was, that more than twelve months had expired since the said Glover had been admitted to the benefit of the prison rules, as aforesaid, and that the act of congress (2 Stats. at Large, 756) in such case provided had limited the benefit of such prison rules to the term of twelve months; upon which motion the said Glover was recommitted, by order of said court, under the said *ca. sas.*, to the common jail aforesaid, where he remained, in virtue of his said recommitment, until the 5th of February, 1825, when he was duly discharged as an insolvent debtor, pursuant to the act (2 Stats. at Large, 239) and acts of congress for the relief of insolvent debtors within the District of Columbia, he, the said Glover, having in all things complied with the requisites of the said act to entitle him to such discharge.

"That after the said original judgments were rendered against the said Glover, as aforesaid, to wit, on the 4th of January, 1819, he bargained and sold the said messuage, etc., now in dispute, to the said John Tayloe, in fee simple, for and in consideration of the sum of ———, then and there duly paid to him by the said Tayloe, in fee, by a deed of bargain and sale, duly executed, acknowledged, certified and recorded according to law, by virtue of which bargain, sale and conveyance said Tayloe entered upon said bargained and sold premises, and ever since has held, possessed and enjoyed the same.

"That no evidence is offered by plaintiff that, at the time of the said bargain, sale and conveyance, and of the payment of the said purchase money to Glover, Tayloe had any actual notice of the said original judgments, or either of them; that is, no other than the constructive notice arising from the records of said judgments. That after said Glover had been discharged as an insolvent debtor as aforesaid, *fi. fas.* were issued from the clerk's office on the said original judgments, at the like instances and for the like benefit of the said assignee or assignees of those judgments, returnable at May term, 1825, and were levied upon said bargained and sold premises (besides other real property which had been before sold and conveyed to other persons by said Glover), then in possession of and held by said Tayloe under his said purchase; and the said bargained and sold premises were afterwards exposed to sale by the marshal, under said executions, and purchased by the lessor of the plaintiff, to whom they were conveyed by the said marshal by a deed in the usual form, duly executed, acknowledged and recorded.

"That the lessor of the plaintiff, by whose order the said executions issued,

had actual notice of the said bargain, sale and conveyance from Glover to Tayloe, and of the possession of Tayloe, before the issuing of the said executions.

"That for the purchase money the lessor of the plaintiff paid nothing, but entered credit on said judgments, or one of them, for the amount of the same.

"Upon the foregoing case stated, it is submitted to the court, if the lessor of the plaintiff be entitled to recover the said messuage, etc., and if the law be for the plaintiff, upon the facts aforesaid, then judgment in the usual form to be entered for the plaintiff, otherwise for the defendant. It is agreed the premises in dispute are of the value of \$1,000 and upward."

Upon the case stated, judgment in the court below was given for the lessee of the plaintiff for his term yet to come and unexpired, etc., etc. To which judgment the defendant below sued this writ of error.

§ 941. *In the District of Columbia and in the state of Maryland a judgment is a lien upon the lands of the debtor from its rendition.*

The first point made by the plaintiff in error is, that by the law of Maryland, which it is admitted is the rule by which this point is to be determined, a judgment is no lien on real estate before execution issued and levied. It seems there is no act of assembly of that state applicable to the case; but that by an act of parliament of 5 George II., chapter 7, lands in the colonies are subject to execution, as chattels, in favor of British merchants; that this statute has been adopted and in use in Maryland ever since its passage, as the only one under which lands have been taken in execution and sold.

It is admitted that though this statute extends in terms only to executions in favor of British merchants, it has long received an equitable construction, applying it to all judgment creditors. The plaintiff's counsel do not assert that this construction has ever been questioned, or that it has not been uniform throughout the state, but asks this court to review this construction, and give the statute such a one as will confine it to the only case for which it makes a provision.

As congress has made no new law on this subject the circuit court were bound to decide this case according to the law of Maryland, which does not consist merely in enactments of their own, or the statutes of England in force, or adopted by the legislature. The adjudications of their courts, the settled and uniform practice and usage of the state in the practical operation of its provisions, evidencing the judicial construction of its terms, are to be considered as a part of the statute, and as such furnishing a rule for the decisions of the federal courts. The statute and its interpretation form together a rule of title and property which must be the same in all courts. Had this question occurred in the courts of that state they would be bound to say that it was now too late to overlook the practical construction which this statute has received for a century and on which numberless titles depend. Property would be held by a very precarious tenure, and infinite confusion would be introduced, if any court should now resort to its terms as furnishing the class of cases in which lands could be sold on execution, and declaring it to extend to none other. It is enough for this court to know that by ancient, well established and uniform usage it has been acted on and considered as extending to all judgments in favor of any persons; and that sales under them have always been held and respected as valid titles. The circuit court were right in deciding that the plaintiff below was entitled to all the benefits of the statute of 5 Geo. II.

Though it does not provide that a judgment shall be a lien from the time of its rendition, yet there is abundant evidence that it has always been so considered and so acted on.

Though the researches of the counsel for the defendant in error have not enabled them to furnish the court with any express judicial decision on this particular question, yet the evidence adduced is not less satisfactory to show that it has long since been settled. The case of *Dorsey v. Worthington*, 4 Harr. & McH., 533, etc., shows that so early as 1771 it was adopted as an established principle, and the later cases in 3 Harr. & McH., 450; Harr. & J., 64, 73; 3 Harr. & J., 497, are founded on it as a well known pre-existing rule, not questioned even by counsel, but apparently of a time so remote as to be beyond not only the memory of any living jurist but the reported decisions of any court. The decisions in the cases referred to are wholly unsupported and unaccountable on any other construction of the statute than the one contended for by the defendant in error.

If a judgment was not a lien from its date, an alienation before execution would prevent it from attaching afterwards. Yet the plaintiff may proceed and sell lands aliened after judgment, without a *scire facias* against the alienee. 2 Harr. & J., 72. So of lands in the hands of a purchaser under a younger judgment (3 Harr. & McH., 450); or against a terre-tenant after the defendant had been arrested on a *ca. sa.* on the same judgment, imprisoned, escaped, and a judgment against the sheriff. 3 Harr. & J., 497; 4 Harr. & McH., 533, S. P. There can, therefore, be no doubt that, from the earliest period, the courts of Maryland had established it as a rule of property, which had become unquestioned long before the cession of this District to the United States, that a judgment is a lien *per se* on the lands of the defendant.

§ 942. *The arrest of the debtor upon a ca. sa. does not discharge the lien of the judgment upon his land.*

The next question which arises is, whether the proceedings which have been had on the judgment in question, prior to the execution on which this lot was sold, have impaired or annulled its lien. The plaintiff had an undoubted right to an execution against the person, and the personal or real property of the defendant; he has his election, but his adoption of any one does not preclude him from resorting to the other, if he does not obtain satisfaction of the debt on the first execution. His remedies are cumulative and successive, which he may pursue until he reaches that point at which the law declares his debt satisfied. A *ca. sa.* executed does not extinguish it. If the defendant escape, or is discharged by operation of law, the judgment retains its lien and may be enforced on his property. The creditor may retake him, or sue the sheriff for the escape. A judgment against him does not amount to a satisfaction of the original debt, but it retains its lien until the plaintiff has done or consented to some act which amounts in law to payment, as the discharge of defendant from custody, or in some cases a levy on personal property. But we know of no rule of law which deprives a plaintiff in a judgment of one remedy by the pursuit of another, or of all which the law gives him. The doctrine of election, contended for by the plaintiff in error (if it exists in any case of a creditor, unless under the statutes of bankruptcy), has never been applied to a case of a defendant in execution discharged under an insolvent act by operation of law; a contrary principle is recognized as well settled in 5 East, 147.

§ 943. *A commitment on a ca. sa. only suspends other remedies.*

The greatest effect which the law gives to a commitment on a *ca. sa.* is a

suspension of the other remedies on the judgment during its continuance; whenever it terminates without the consent of the creditor, the plaintiff is restored to them all as fully as if he had never made use of any. The cases cited by the defendant from Buller's *Nisi Prius*, 69; 5 Coke, 86*b*; Blumfield's Case, and those in the courts of Maryland, fully support and are decided on this principle. In 1 Ves., 195, Lord Hardwicke decided that where a defendant was in custody under a *ca. sa.*, and a *fi. fa.* was afterwards taken out on the same judgment, and a farm levied on and sold, the purchaser being a stranger should hold it, as the *fi. fa.*, though irregular and erroneous, was not void. The authority of this decision has never been questioned, and fully establishes the position that a *ca. sa.* neither extinguishes the debt nor annuls the subsequent proceedings on a *fi. fa.*, though the case would have been different had the plaintiff in the judgment been the purchaser. In the present case, we must consider Thomson as the plaintiff in the judgment on which the lot in controversy has been sold, and that the sale may be open to objections which would not be good against a stranger purchaser; but we can perceive in the case stated no facts which in any manner legally invalidate his purchase. He had a right to make use of the *ca. sa.* until he obtained satisfaction. The escape of Glover by his breach of prison bounds could not affect the lien of the judgment. The plaintiff was not bound to resort to the prison bond as his only remedy; a judgment on it against Glover was no more a bar to a *fi. fa.* than a judgment against the sheriff for an escape; and Glover could place himself in no better situation by breaking his bond than by remaining a true prisoner. Whether he escaped or remained in prison bounds, the marshal was bound to recommit him to close custody after the expiration of twelve months from the date of the bond. Third section of the act of June, 1812, Burch, 277 (2 Stats. at Large, 756). This was a measure directed by law without any application to the creditor; its being done in this case on his motion cannot vary the effects, for Glover in either case must remain in custody until the debt for which he was committed was paid or he be discharged under the act of congress for the relief of insolvent debtors. Up to this time, no act was done by the judgment creditor which could impair the legal effect of his judgment by any rule of the common law, the laws of Maryland or the District of Columbia, or by any legal adjudication of the courts of that state on the construction of the statute.

It remains only to consider the effect of the proceedings under the insolvent law of the district under which Glover was discharged. The counsel for the plaintiff in error relies on the last clause of the fifth section of this law (2 Stats. at Large, 239), as conclusive against the proceedings on the judgment subsequent to Glover's discharge. "And no process against the real or personal property of the debtor shall have any effect or operation except process of execution and attachments in the nature of executions, which shall have been put into the hands of the marshal antecedent to the application."

The true meaning of this clause can be ascertained from the provisions of the preceding part of the law; the debtor is to make out a list of all his property, real, personal and mixed, and offer to deliver it up to the use of his creditors; the court then appoint a trustee, who is required to give bond with security for the faithful performance of his trust. The debtor is then directed to execute to the trustee a deed conveying all his property, rights and credits.

The lot in question was not the property of Glover at the time of his application for the benefit of the law; he had conveyed it in fee in January, 1819,

and received the purchase money, and therefore neither could have any property in the lot or right or credit arising from the sale — nothing to deliver up to his creditors or convey to the trustee; no question could arise between them and the judgment creditor; and the trustee could have no right to sell the lot and distribute the proceeds among the creditors of Glover. The fifth section applies only to the property which passed to the trustee by the deed from the insolvent, not to what he had conveyed to Tayloe in 1819, six years before Glover's discharge. The trustee acquired what the debtor had at the time of his application, or was in any way entitled to, that he could sell, and must distribute ratably among all the creditors after satisfying incumbrances and liens. The application of the clause of this section before recited was intended only for a case where one creditor sought to obtain a preference by process against the debtor's property after his application. In such case, it declared it should have no effect or operation; but where the incumbrance or lien had attached before the application, it had a priority of payment out of the assigned fund.

Thus understood, the case is perfectly plain. This law can have no application to real estate, which never did and never could come into the hands of the trustee for distribution; but left the judgment creditor with all his rights to enforce the lien of his judgment on lands of the debtor in the hands of the plaintiff in error, who purchased after its rendition, and must hold it as the debtor did, subject to its lien.

It is not alleged that the proceedings subsequent to the levy on the lot are erroneous or void; they appear to have been regular, and therefore vested the title to the lot in controversy in the lessor of the plaintiff. The judgment of the circuit court is affirmed, with costs.

#### CLEMENTS v. BERRY.

(11 Howard, 398-413. 1850.)

#### Opinion by MR. JUSTICE McLEAN.

This case is brought here by a writ of error to the supreme court of the state of Tennessee, under the twenty-fifth section of the judiciary act.

§ 944. *This court has jurisdiction when a state court decides that a title by deed is superior to a title under a judgment of the circuit court of the United States.*

The jurisdiction of this court is the first question to be considered. The plaintiff sets up a lien on certain personal property, under a judgment rendered by the circuit court of the United States, held for the middle district of Tennessee. The defendant asserts a lien under a deed of trust for the property, from Charles F. Berry, and the supreme court of Tennessee held that the lien of the deed was paramount to that of the judgment. This brings the case within the twenty-fifth section, as the decision was against the right asserted by Clements, under the authority of the United States.

STATEMENT OF FACTS.—The judgment was obtained by the firm of Inskeep, Moulton & Woodruff, at March term, 1848, for \$1,316.68, against Charles F. Berry. The declaration was filed on the 1st of March; rule for plea by the 8th of March; no plea being filed within the rule, a judgment was entered by default. On the 10th of March, the "plaintiffs appear by their attorney, and a judgment by default having been taken in this cause on the 8th of March, 1848, and no motion having been made to have the same set aside, it

is therefore considered by the court that said judgment by default be affirmed," etc.

The deed of trust was received at the register's office fifty-one minutes after 9 A. M., on the 10th of March, the same day the deed bears date. The court, it seems, was opened on the 10th, at 10 o'clock A. M.; so that the deed was deposited with the register nine minutes before the court opened on that day. The register, by law, is required to enter on a record the exact time that an instrument is filed for record, and the lien attaches from such entry.

Execution was issued on the judgment, tested the first Monday of March, the day at which the term commenced. It was levied upon part of the goods assigned in the deed of trust, and those goods were replevied by Daniel Berry, the trustee, from Clements, the marshal.

It is the uniform practice of the federal and state courts of Tennessee to test executions as on the first day of the term; and the lien is held equally to attach to all the judgments, as regards creditors, entered at the same term. This rule would not apply, perhaps, to a *bona fide* purchaser of real estate for a valuable consideration, beyond the day on which the judgment was rendered. It is admitted that the statute of 29 Charles II., as to the liens of judgments and executions, is not in force in Tennessee; and that the lien is regulated by the common law, modified to some extent by statutes. As against a *bona fide* purchaser of personal property the lien would not attach prior to the award of execution. But the trustee in this case cannot be considered a purchaser, as the assignment was made to him, not on a purchase for a valuable consideration, but for the benefit of certain creditors.

It would present a singular anomaly in judicial proceedings if the fruits of a judgment could be defeated by a transfer of all the property of the defendant on the day of its rendition; and with the express view of avoiding the claim of the plaintiff in the judgment by giving a preference to other creditors. That such an assignment would be fraudulent as tending to delay and defeat creditors is clear, but no such defense was made in the state court.

§ 945. *A judgment by default in an action of debt is a final judgment, and its lien attaches upon its rendition.*

The decision must turn upon the effect of the entries made on the minutes of the circuit court. The term of the court commenced on the 6th of March. The declaration was filed on the 1st of March, and a rule for plea was taken in court by the 8th. The rule of court provides that if the pleadings are not filed by the defendant on or before the first day of the term, the court may on that day fix the time when the pleadings are to be closed and judgment entered.

The plea not being filed within the rule a judgment by default was entered. Now a judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass, etc., it is only interlocutory that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. 1 Tidd's Pr., 568. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final. And of this character was the judgment entered on the 8th of March. The action was debt, brought upon several notes of hand; the default admitted the execution of the notes, and the judgment which followed was final, leaving the clerk to make it up in form. The affirmance of this judgment on the 10th of March was unnecessary, as the judgment of the court on the 8th



concluded the matter in controversy. It was a mere clerical duty to make the calculation and enter the judgment in form; and the entry on the 10th can be considered, in regard to the lien in question, in effect as nothing more than the performance of this clerical duty, which had been authorized by the entry on the 8th. It was an affirmance of that which already had been fixed by the judgment of the court. What remained to be done was matter of form, as it added nothing to the legal effect of the judgment by default. Had the defendant been called and a default entered against him, the case would have stood for judgment at a future call of the docket. But under the rule of the court "the pleadings were to be closed on the 8th and judgment entered." The defendant failed to plead, and a judgment by default consequently followed. The action being debt, founded upon notes of hand, which were admitted to be genuine by the default, the court saw that no inquiry was necessary, and the judgment was therefore directed to be entered. That judgment was final according to the forms of entering judgments at the common law. The omission by the clerk to make the calculation of the amount of the judgment, and enter it in form on the 8th of March, was supplied by the entry on the 10th. Such entry, therefore, we think, may be considered as having relation to the first judgment.

§ 946. *A trustee for the benefit of creditors is not a bona fide purchaser.*

It is said to be a legal absurdity to suppose that the lien of the execution can attach prior to the judgment. An execution can be of no validity which has not a judgment to support it. But the judgments entered on the last day of the term, by the law of Tennessee, have relation to the first day of the term, so as to place all the judgments entered at the term on an equality in regard to liens. This, it is said, is proper to do equal justice to creditors, whose judgments were necessarily entered on different days of the term, from the arrangement of the causes on the docket. But it is said that a *bona fide* purchaser for a valuable consideration would limit the lien of the judgment and execution to the time the judgment was rendered. If this be so, it is not perceived how the principle can be applied to the case before us, unless the defendant in error be considered a *bona fide* purchaser. He cannot place himself in that attitude. He holds the property in trust for the creditors named, having paid at the time no consideration for it; and having, as may be presumed from the circumstances, a knowledge that the assignment was made to avoid the effect of the judgment against the assignor. It would be difficult to maintain that this was a *bona fide* transaction, and especially that it was entitled to the favorable consideration of the court. In no sense can it be considered a *bona fide* sale for a valuable consideration. The trustee is made the agent to pay the creditors named, and he represents their interests as creditors. But if the property had been sold *bona fide*, from the effect of the judgment by default, and the relation to it of the formal judgment of affirmance subsequently entered, the lien would attach from the judgment on the 8th.

We admit that the lien of the judgment and execution in the federal courts arises under the state laws; and that the lien may be considered as a rule of property and a rule of decision under the thirty-fourth section of the judiciary act of 1789. But the preparatory steps by which the judgment is obtained and the lien established depend upon the practice of the court; and that practice is settled by the federal courts, and not by the courts of the state. The process act of 1828 "adopted the forms of mesne process, except the style and forms and modes of proceeding in suits in the courts of the United States held

in those states, etc., subject, however, to such alterations and additions as the said courts of the United States respectively shall in their discretion deem expedient, or to such regulations as the supreme court shall prescribe."

The entry by the register of the precise time at which all instruments are deposited with him for record, as required by the act of Tennessee, is no doubt a very proper regulation. It is salutary in relation to instruments deposited for record on the same day. In such cases the priority of time may be ascertained with certainty; but when the fractions of a day are to be compared under such entries to a judgment lien, the propriety of the rule is not so apparent. The case before us would present a point of no small difficulty. From the entry the trust deed appears to have been deposited for record nine minutes before the court was opened. And this is to render inoperative the lien of the judgment. Now how is the fact to be ascertained with certainty? Where shall the exact standard of time be found? A variation of nine or ten minutes is not uncommon in chronometers; and the timepiece of the register, it is supposed, could have no exclusive claim to regulate judgment liens. Whether good or bad, it would answer the purpose designed by showing the priorities of instruments left for record. But the test in regard to judgment liens would be uncertain and unsatisfactory. As a rule of property it would seem to be, at least in many cases, impracticable. How can one, five or ten minutes be ascertained with the requisite certainty to lay the foundation of a right? It would hardly be contended that the entry of a ministerial officer, though made by authority of law, should limit or defeat a judgment lien in such a case. No other decision of the supreme court of Tennessee than the one now before us is applicable to this question. And if the case to be reviewed is to constitute the rule for our decision, as insisted, the power of revision would be useless.

Whilst we follow the construction of a state statute, established by the supreme court of the state, care must be taken that our jurisdiction and practice shall not be limited or controlled by the statutes or decisions of the state beyond the acts of congress.

The judgment of the state court is reversed, and the cause is remanded to that court for further proceedings in conformity with this opinion.

TANEY, C. J., and JUSTICES CATRON, DANIEL and NELSON dissented, CATRON, J., holding that the judgment by default was not final, and that the decision of the state court was correct.

#### ROCKHILL v. HANNA.

(15 Howard, 189-197. 1853.)

#### Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—This case comes before us on a certificate of division of opinion between the judges of the circuit court of the United States for the district of Indiana. It is an action on the official bond of the marshal, and the questions certified arise on the following facts: Rockhill & Co., the plaintiffs in this issue, and Price & Co. and Siter & Co., had each entered up judgments on the same day (November 19, 1833), against John Allen. On the 5th of March, 1839, Price and Siter issued *fi. fas.*, which were levied on the lands of Allen. On the 7th of February, 1839, plaintiffs issued a *ca. sa.*, on which the defendant Allen was arrested and imprisoned till the passage of

the act of general assembly of Indiana of 13th of January, 1842, to abolish imprisonment for debt; by virtue whereof he was released on the ground that this act had been adopted by act of congress. The plaintiff afterwards, in March, 1844, on affidavit and proof of the defendant's discharge by force of the insolvent law, had leave of the court to issue a *fi. fa.*, which was levied on the same land previously seized in March, 1839, on the executions issued on the other judgments, and the marshal was proceeding to sell when writs of *vend. exp.* on these judgments were put in his hands. A sale was made, but afterwards set aside by the court. In May, 1844, writs of *vend. exp.* on all three of the judgments were put into the hands of the marshal; on these the property of Allen was sold, the money raised being insufficient to pay all the judgments. Plaintiff (Rockhill) claimed that the money should be applied first to the satisfaction of his judgment; Price and Siter claimed that it should be applied to satisfy their judgments first. Whereupon the court certified a division of opinion on the following questions:

"1. Whether or not the plaintiffs in this suit are entitled to more than their distributive share of the proceeds of the sale. 2. Whether they are not entitled to the whole proceeds, to the extent of what is justly due on their judgment. 3. Or whether the executions first levied are not entitled to the whole proceeds of the sale. 4. Or whether there can be any preference recognized by reason of superior diligence, the judgments being of equal dates, and not impeached."

§ 947. *Where the statute does not provide for fractions of days, all judgments against one party on the same day have equal rights as liens.*

In the state of Indiana, judgments are liens upon "the real estate of the persons against whom such judgments may be rendered, from the day of the rendition thereof." As the statute provides for no fractions of a day, it follows that all judgments entered on the same day have equal rights, and one cannot claim priority over the other. In England, when several judgments are entered to the same term (and by fiction of law the term consists of but one day), the judgment creditor who first extends the land by *elegit* is thereby entitled to be first satisfied out of it. The case would be much stronger, too, in favor of the first *elegit*, if one of three judgments had levied a *fi. fa.* on the goods and chattels of the defendant, the second taken his body on a *ca. sa.*, and the third laid his *elegit* on his land. For each one, having elected a different remedy, would be entitled to a precedence in that which he has elected. This principle of the common law has been adopted by the courts of New York, as is seen in the cases of *Adams v. Dyer*, 8 Johns., 350, and *Waterman v. Haskins*, 11 Johns., 228; and also by the supreme court of Indiana, in *Michaels v. Boyd*, 1 Smith, 100, and others, where it is said the mere delivery of an execution, as in case of personal property, will not give a priority, but the execution first begun to be executed shall be entitled to priority.

§ 948. *Priority among judgment creditors.*

The application of these principles to the present case would give the preference to the judgments of Siter and Price, which were levied on the land five years before the plaintiff's levy on the same.

§ 949. *Postponement of sale under execution, in absence of fraud, does not postpone the plaintiff therein to a subsequent levy by another execution creditor.*

An execution levied on land is begun to be executed and is an election of the remedy by sale of it; and the mere delay of the sale, if not fraudulent, injures no one and cannot postpone the rights of the creditor who has first

seized the land and taken it into the custody of the law for the purpose of obtaining satisfaction of his judgment. If he has obtained a priority over those whose liens are of equal date, by levying his execution, he is not bound to commence a new race of diligence with those whose rights are postponed to his own. There may be a different rule as to a levy on personal property, where it is suffered to remain in the hands of the debtor. But liens on real estate are matters of record and notice to all the world, and have no other limit to their duration than that assigned by the law.

§ 950. *The creditor who elects to levy ca. sa. waives elegit and fi. fa, and as to goods and lands is postponed to those who levy the latter writs; and repeal of ca. sa. by statute does not restore his priority; and so if the debtor die in prison or is discharged under insolvent laws.*

But we do not think it necessary to rest the decision of this case merely on the question of diligence, or to decide whether this doctrine has been finally established as the law of Indiana. The plaintiff's lien does not, by the statement of this case, stand on an equality as to date with that of the other judgments. By electing to take the body of his debtor in execution he has postponed his lien, because the arrest operated in law as an extinguishment of his judgment. It is true, if the debtor should die in prison, or be discharged by act of the law without consent of the creditor, he may have an action on the judgment, or leave to have other executions against the property of his creditor. The legal satisfaction of the judgment, which for the time destroys its lien and postpones his rights to those whose liens continue, is not a satisfaction of the debt, but, as between the parties to the judgment, it operates as a satisfaction thereof. The arrest waives and extinguishes all other remedies on the goods or lands of the debtor while the imprisonment continues, and if the debtor be discharged by the consent of the creditor, the judgment is forever extinguished, and the plaintiff remitted to such contracts or securities as he has taken as the price of the discharge. But if the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon as against creditors who have obtained a precedence during such suspension. The case of *Snead v. McCoull*, 12 How., 407, in this court, fully establishes this doctrine. It is to be found in the common law as early as the year books, and is admitted to be the law in almost every state in the Union. See *Year Book*, 33 Hen. VI., p. 48; *Foster v. Jackson*, Hob., 52; *Barnaby's Case*, 1 Str., 653; *Vigers v. Aldrich*, 4 Burr., 2483; *Jaques v. Withy*, 1 T. R., 557; *Taylor v. Waters*, 5 Maule & Selw., 103; *Ex parte Knowell*, 13 Ves. Jr., 193, etc. And in New York, *Cooper v. Bigelow*, 1 Cow., 56-206; *Ransom v. Keys*, 9 Cow., 128; 5 Wend., 58. In Pennsylvania, *Sharp v. Speckenagle*, 3 Serg. & R., 463. In Massachusetts, *Little v. The Bank*, 14 Mass., 443.

The insolvent law of Indiana, which discharges the person of the debtor from imprisonment upon his assigning all his property for the benefit of his creditors, provides that his after-acquired property shall be liable to seizure, and also that liens previously acquired shall not be affected by such assignment and discharge; but it does not affect to change the relative priority of lien creditors, as it existed at the time of the discharge, or to take away from any lien creditor his prior right of satisfaction, which had been vested in him previous to such discharge. Neither the letter nor spirit of the act will permit a construction which by a retrospective operation would divest rights vested before its passage.

We are of opinion, therefore, that the several questions certified from the court below should be answered as follows:

1. That plaintiffs in this suit are not entitled to more than their distributive share of the proceeds of the sale. 2. That they are consequently not entitled to the whole proceeds to the extent of what is due on their judgment. 3. The executions of Siter & Co. and of Price & Co. are entitled to be first satisfied from the proceeds of the sale. 4. That the decision of the preceding questions being a disposition of the whole case, it is unnecessary to give any answer to the fourth question.

BURTON v. SMITH.

(18 Peters, 464-485. 1839.)

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court for the fifth circuit and eastern district of Virginia. The case was this: In the month of June, 1827, Smith and Kennedy obtained a judgment in the circuit court against Reuben Burton, for \$1,348.75, with interest from the 14th October, 1823, and costs. On this judgment an *elegit* was issued on the 31st of December, 1827. On the 12th of August, in the same year, Reuben Burton, by deed, conveyed his real estate to certain trustees, in trust, to sell the same for the benefit of his creditors; amongst many other debts enumerated in the deed, the judgment already mentioned, recovered by Smith and Kennedy, was included.

These last-mentioned creditors, the appellees, never assented to or accepted anything under the trust deed. Burton having died, the only trustee who accepted the trust, on the 21st of December, 1829, sold, under the deed, all the estate, both real and personal, conveyed by it; and at that sale, Sarah Burton, by her agent, purchased, at the price of \$1,000, the interest of Reuben Burton, that is, two-fifth parts in a certain tract of land called Springfield, supposed to contain about five hundred acres, and also his interest in certain coal-pits on the same tract. The character of Reuben Burton's interest in the Springfield tract of land, as appears from the record, was that of a reversion in fee, after an estate for life. And the character of his interest in the coal-pits, as appears from an agreement in the record, was this: The heirs of Daniel Burton, of whom Reuben was one, were to have, during the widow's life, the right of occupying, using and working the coal-pits, and the right and power of sinking shafts, and searching for coal on any part of the land, except the yard, etc.; paying to the widow, during her life, the yearly sum of \$200, for her dower interest. The same agreement will show his interest in a mineral spring, also included in the decree.

After the death of Reuben Burton, the appellees, finding that there was no personal estate to satisfy their debt, in September, 1834, filed their bill to enforce the lien created by their judgment; making, amongst others, Sarah Burton a defendant, as purchaser of the interest of Reuben Burton, before described, in the Springfield tract of land and coal-pits.

She answered, saying that the property conveyed to her was not purchased for her own benefit, but for the benefit of her son, Thomas O. Burton, the appellant. She insisted, in her answer, that the appellees had no right to enforce their judgment, as more than five years had elapsed since the death of Reuben Burton; she denied that the judgment created any lien on the property pur-

chased by her which was valid against her; she insisted that the appellees were entitled to no relief in equity; and that, at all events, a sale should not be decreed. An amended bill was thereupon filed, making Thomas O. Burton a defendant. He filed an answer, insisting upon the grounds taken by Sarah Burton.

The cause coming on to be heard, the court held the reversionary interest of Reuben Burton in the Springfield tract of land, and his interest in the right of occupying and working the coal-pits thereon, and also his interest in the mineral spring thereon, with the twenty-five acres of land adjoining thereto, liable to the appellees' judgment; and decreed a moiety of Reuben Burton's interest to be sold. From that decree this appeal is taken.

Upon this state of facts two questions arise: 1. Whether the judgment created a lien on the reversionary interest of Reuben Burton in the land in question? And, 2. Whether it was competent to the court to decree a sale of his interest, with a view to accelerate the payment of the debt; or whether the appellees should have been left to such remedy as they had at law?

§ 951. *In Virginia, a judgment is a lien on land of which the defendant is seized.*

As to the first point. In relation to lands of which the debtor has the actual seizin, there is no doubt but that the judgment creates a lien. Upon this subject, this court said, in the case of *The United States v. Morrison*, 4 Pet., 124, there is no statute in Virginia which expressly makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right, the lien is universally acknowledged. That right unquestionably existed in this case; because an *elegit* did actually issue within the year after the judgment was rendered.

§ 952. *A reversionary interest in land is subject to the lien of a judgment.*

There would then be no sort of difficulty upon the question of a lien, if the debtor had had actual seizin of the land; but the difficulty is suggested that his interest was reversionary only. Let us inquire whether this interposes any obstacle. All the authorities, ancient and modern, agree in this proposition, that a reversion after an estate for life is assets; or as some of the books express it, *quasi* assets, in the hands of the heir, in regard to the bond of his ancestor, binding heirs; and that, in such case, the plaintiff may take judgment of it, *quando acciderit*. Dyer, 373; Carthew, 129; 1 Lord Ray., 53. Chitty on Descents, 336. In Dyer, *ubi supra*, the form of the judgment in such case is given. It is, "that he should recover the debt and damages of the afore-said reversion, to be levied when it shall fall in." And it is added, that a special writ shall issue to extend the whole. The doctrine upon this subject is laid down very clear by the master of the rolls, in the case of *Tyndale v. Warre*, 1 Jacob, 217, 218. There are, says he, three cases of reversions; if it be a reversion dependent upon a term of years, the law does not consider the term as anything, and judgment is given against the heirs, if he plead *reins per descent*. But if the creditor take out an *elegit*, he is stopped by the term, which is a good defense for the lessee in ejectment, and so there is a *cesset executio* during the term. If it be a reversion after an estate for life, the heir must plead specially, stating that he has no assets except this, and setting forth what it is; the creditor may then take judgment *quando acciderit*. In the case of a reversion after an estate tail, the authorities say that the heir may plead, generally, *reins per descent*, distinguishing this from the plea in

the case of reversion after an estate for life. The plaintiff may then reply that there is this reversion descended to the defendant; and he may then have a judgment *quando acciderit*, the same as in the case of a reversion after an estate for life.

§ 953. *Whatever estate descends to the heir which was liable to the debt of the ancestor is bound by a judgment against the ancestor.*

Now, upon principle, it would seem to be clear that whatever estate descended to the heir, which was liable as assets to the bond debt of the ancestor, must be bound by a judgment obtained against the ancestor in his life-time. But this is not left to rest upon deductions from general principles, or analogy to the case of assets descended to the heir. Whatever may be the doctrine as to reversions after estates tail, about which there has been some doubt, as appears from the case before cited from Jacob's Reports, there is a current of authority going to prove that a reversion after an estate for life, is bound by a judgment against the ancestor from whom it immediately descends.

The statute of Virginia giving to a party the right, at his election, to have an *elegit*, is almost a transcript of the statute of Westminster the second. The writ itself commands the officer to deliver to the plaintiff a moiety of all the lands and tenements whereof the debtor, at the time of obtaining the judgment was seized, or at any time afterwards. Lands and tenements, then, are the subject on which the writ is to operate. Now, in Comyn's Digest, title Grant, E. 2, it is said that, by grant of all lands and tenements, a reversion passes. In the same book, title Estate, B. 12, it is said: If a man grant the land itself, the reversion passes. So in Moore's Reports, 36, a reversion is said to be a tenement. Thus it appears that a reversion falls within each of the terms, lands and tenements. But the party must have been seized at the time of obtaining the judgment or afterwards.

§ 954. *"Seizin," in the statute of Westminster, is not confined to corporeal possession.*

Now let us see what is meant by the seizin spoken of in the statute. And the authorities are clear that it is not confined to actual corporeal possession. In Gilbert on Executions, pages 38 and 39, it is said that the judgment binds not only the lands and tenements of which the defendant is actually seized, but also the reversions on leases for lives, as well as for years; for although the words of the *elegit* are, that without delay you cause to be delivered a moiety of all the lands and tenements of which the aforesaid B. was seized, etc., yet the intent of the writ extends to whatever lands and tenements were actually vested in the defendant; because the statute is a moiety of the land which extends to reversions, which are comprised under the name land, since they are lands returning to the defendant when the particular estate ceases.

So in 2 Williams' Saund., 68, it is said: Judgment binds not only lands of which defendant is actually seized, but also reversions on leases for lives or years; and, therefore, a moiety of a reversion may be extended, and plaintiff will have a moiety of the rent. So in Chitty on Descents, 338, it is said that, if judgment be had in the debtor's life-time, it will bind the property, though no execution be taken out till the property descends to others. Nay, in case of a judgment, it is said to bind even where it is against a person from whom the estate does not immediately descend, as if it were against a remainderman or reversioner; whereas the contrary would be the case of a bond on which no judgment had been rendered in the debtor's life-time, who stood in the same relation.

The author last cited, in page 54, quoting Watkins on Descents, 40, 41, speaking of the subject of seizin of reversions, remarks that the confusion seems to have been created by the different meanings which have been attached to the word "seizin;" by being used in a general sense when it should properly have been confined in its acceptation; or by being confined when it should have been taken in a general sense. And in pages 53, 54, he thus sums up the doctrine: We must here remember that the expressions or terms of a seizin in law and a seizin in deed refer only to the present and actual corporeal possession of the premises, and not to the fixture of an interest which is to come into actual enjoyment in some future event; and here the word "seizin" is used in its strict sense; and though we frequently use the term "seizin" of a remainder or reversion expectant upon a freehold, yet this signifies no more than that the property in them is fixed in the owner, and that such owner is placed in the tenancy. The particular estates, and those expectant upon them, form in law only one estate; and the delivery of possession to the person taking first extends to all. All, therefore, may be said to be seized, all being placed in the tenancy, and the property being thus fixed in all. It is upon these principles that the authorities lay down the doctrine that a judgment binds a reversion after an estate for life.

§ 955. *Judgments bind reversionary interests in lands. And where the writ is an elegit upon a bill in equity by creditors, the interest will be ordered sold to accelerate payment of the debt.*

We are therefore satisfied that the judgment of the appellees bound the reversionary interest in the land in question; and as to the other property embraced in the decree, there is no room for doubt or difficulty. And then the question is, whether the court ought to have decreed a sale, with a view to accelerate the payment of the debt; or whether the appellees should have been left to such remedy as they had at law? Upon the subject of the power of a court of equity in this respect, the authorities are decisive. More than a century ago, in the case of *Robinson v. Tong*, 3 Viner's Abr., Assets, A., pl. 28, p. 145, an advowson was decreed to be sold, at the instance of creditors, as assets descended; and the decree was affirmed in the house of lords. That is supposed to have been the case not of judgment, but bond creditors. In *Stileman v. Ashdown*, 2 Atk., 607, Lord Hardwicke decreed a sale of moiety of the land to satisfy a judgment creditor. He confined the decree to a moiety because the judgment only bound a moiety at law. On that occasion he said that whilst equity could not change the rights of the parties, it might accelerate the payment by directing the sale of a moiety, and not let the creditor wait until he was paid out of the rents and profits. The principle was asserted by Lord Redesdale, in 2 Sch. & Lef., 138, and in the same book, 13, and such he stated to be the settled doctrine in Ireland. In the first of these cases he said: "Although this court has been in the habit of selling to pay judgment debts where it was ascertained that they were legal liens on the land, the foundation of that was the legal right. The only equity the creditor had was to render his remedy more effectual by getting a sale, instead of levying his debt out of rents and profits, which was the only execution the common law gave."

These cases are cited and relied upon, and the doctrine of them approved, in 2 Leigh, 30; and in page 58 of that volume Judge Green says: "This principle, so far as I am informed, has been uniformly practiced on in Virginia in the cases of heirs bound by the obligations of their ancestors. And although



I cannot see clearly the foundation of this equity to sell, where the law only authorizes an extent, or a personal judgment or decree against the heir for the value of the assets descended, whether aliened by him or not (see the statute of fraudulent devices), yet I think we are bound by the practice founded on these precedents, so long acquiesced in." In 6 Leigh, 196, which was a suit in equity brought by creditors to marshal assets, the same authorities were again cited with approbation; and the same doctrine reasserted by the judges in their reasoning upon the case. In pages 219, 220, of this latter case, Judge Carr went into a review of English cases, which he said seemed to him to establish, beyond question, the regular and long established course there of selling the lands of deceased persons to pay their debts, binding the land, or to marshal their assets; and he added that it struck him as a novelty, when, in the course of the argument of the case, he heard a doubt suggested of the power of the court to decree a sale in such cases. In the case of *Tyndale v. Warre*, 1 Jacob, 212, this subject was extensively considered by Sir Thomas Plumer, master of the rolls, who held, in that case, a reversion expectant upon an estate for life, and even upon estates tail limited to unborn children, to be assets for the payment of specialty debts; and accordingly he decreed it to be sold for that purpose. This last has a peculiar analogy to, and bearing upon, the case before us, because it sustains, in the fullest and most decisive manner, both the grounds on which the decree of the circuit court rests; that is, it proves first that a reversion after an estate for life, or even after estates tail limited to unborn children, is assets, liable to the specialty debt, and, of necessary consequence, to the judgment of the ancestor from whom it immediately descends; and, secondly, that a court of equity will decree such a reversion to be sold in order to accelerate the payment of the debt. The liability of a reversion after a life estate to be sold was at once conceded by the counsel for the heir; their effort was to maintain that the reversion in that case could not be sold, because it was after an estate tail.

It was strongly said by the master of the rolls in that case, that the reversion was a part of the real estate of the ancestor; and according to all general principles, every part of the real estate of the debtor, except copyhold, is considered as applicable to the payment of his specialty debts. There is another part of the reasoning of the master of the rolls which has a most cogent application to this. It having been urged that a sale ought not to be decreed, out of consideration to the heir, that a higher price might be obtained, he said: "But I think that such considerations ought not to weigh; for the question is, to whom does the property belong? It is not the habit of the court to consider the interest of the heir, when opposed to that of the creditors. They ought to have the fullest remedy. And upon what principle can the court refuse to give them the benefit of a sale, because another person whose interest is secondary, and entirely subject to theirs, may be benefited by delay?" So far from its being proper for a court to hesitate about decreeing the sale of an interest because it is reversionary, we think that the character of the interest affords a stronger reason. For in regard to property in present actual possession, the *elegit*, although a tardy remedy in its operations, yet is in some degree an effective remedy; inasmuch as the creditor will by that means annually receive something towards his debt; whereas in the case of a dry reversion, as the one in the present case is, if the outstanding life estate should continue during half a century, the creditor might look on in hopeless despondency, without the possibility of receiving one cent from that source, except through

the interposition of a court of equity, in decreeing a sale. Now if the acceleration of a tardy remedy be cause enough to justify the helping hand of equity, *a fortiori* it ought to be extended to him who during the life of the tenant for life is without any remedy at all. As to the objection that the judgment did not bind the land in the hands of the appellant because he was a purchaser, we consider it wholly untenable. We have already said that the judgment created a lien; now it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere*; if this were not the case, it would cease to be a lien. If this proposition stood in need of authority to support it, we find it abundantly in the case of *The United States v. Morrison*, 4 Pet., 124. In that case the judgment of the United States rendered in 1822 was held to overreach several deeds of trusts executed in 1823; although the United States having issued a *feri facias*, whilst that execution was in the marshal's hands, the agent of the treasury, at the instance of the defendants, instructed the marshal to forbear levying it on condition of the defendants' paying the costs; and accordingly the marshal did not make a levy, but made a return within the year 1822, that all further proceedings were suspended in pursuance of said instructions; and that suspension was continued until the year 1825.

A very strong application of this doctrine was made in the case of *The Mutual Assurance Society v. Stanard*, 4 Munf., 539. In that case a deed of trust, bearing date 28th April, 1808, was held to be overreached by a judgment rendered on the 6th of May; the court applying the legal fiction that the judgment in contemplation of law related back to the commencement of the term, which was before the execution of the deed.

A still stronger application of the doctrine was made by the same court, in the case of *Coutts v. Walker*, 2 Leigh, 268. In that case the court held that a judgment creditor had a lien in equity upon the equitable estate of the debtor, in like manner as he had a lien in law upon his legal estate; and a deed of trust having been executed by the debtor conveying his equitable estate to a trustee, and that too for the benefit of creditors between the commencement of the term and the day on which the judgment was obtained, the same relation of the judgments to the first day of the term, as in the case previously cited, was held to exist; and thus the trust deed was overreached by the judgment.

It is argued that the judgment in this case was barred by the act of limitations of Virginia. That act provides that no action of debt shall be brought against any executor or administrator upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or administrator, or revive such judgment, after the expiration of five years from the qualification of his executor or administrator. The facts in the record furnish a decisive answer to this argument. It appears from them that the administration on Reuben Burton's estate was granted on the 9th of December, 1829; and this suit was brought on the 15th of September, 1834. So that five years had not elapsed from the time of the qualification of the administrator. This view renders it unnecessary to examine whether the appellees would not have been within the saving of the statute, as contended for by their counsel.

Furthermore, it is objected that there should have been an account taken of the administration of Reuben Burton's personal estate. Without stopping to inquire whether that would be necessary in any case where the suit is brought

merely to enforce a legal lien, it is a sufficient answer to this objection to say that there is abundant evidence in the record that there was no personal estate; nothing, therefore, could have been more unnecessary or unprofitable than to have ordered an account to be taken.

The last objection is, that an account should have been ordered of the rents and profits of the coal property. Here, too, the record furnishes a satisfactory answer. Assuming, for the purpose of meeting this objection, that, by analogy to the case of marshaling assets, a court of equity would not decree a sale of real estate to satisfy a judgment where the rents and profits would discharge it in a reasonable time, as was held by the court in the case of *Tenant's Heirs v. Pattons*, 6 Leigh, 196, yet the facts of this case utterly repel the application of that principle to it. In that case, it will be seen that the debts of the ancestor were said by one of the judges to amount to \$820, and the annual value of the land was ascertained to be \$400.

In that case, therefore, the debt would be satisfied by the rents and profits in a short time. In this case the facts are these: There was an outstanding life estate in all the Springfield tract of land, except the coal-pits and the mineral springs. Reuben Burton's interest in the coal-pits was two-fifths in the privilege of working them during the life-time of the tenant for life, she receiving annually \$200 for the whole. Reuben Burton's real interest then is only two-fifths of any surplus which might remain after deducting two-fifths of the annual rent to be paid. But the parties themselves seem to have considered \$200 per annum as the full value of the whole privilege of working them. If the agreement of the parties were to be taken as the standard of the annual value, his interest would really be worth nothing, because he would have to pay precisely the same proportion of the rent which he received of the profits, and it must be assumed that they were worth more than the parties fixed as the value in order to make any surplus at all. But at all events there is nothing in the case to justify the belief that there would be any surplus that would discharge the judgment in a reasonable time, or even in a long time, for at the date of the decree the whole debt, including principal, interest and costs, amounted to about \$2,500, and the principal being \$1,348.75, there would be an annually accruing interest of about \$80, besides the annual payment of two-fifths of the \$200 for rent, which would be \$80. Thus it will appear that his interest of two-fifths must produce \$160 annually in order even to prevent the debt from being increased. To allow \$160 for his two-fifths would require that the whole should be worth annually \$400, which is precisely double the sum at which the parties fixed the rent.

This, then, seems to us to be, emphatically, a case in which the established principles of equity justify the sale of the property with a view to accelerate the payment of a debt due to a judgment creditor. In every respect in which we have viewed the case we think that the decree of the circuit court is correct, and it is therefore affirmed, with costs.

§ 956. At common law — *Elegit*.— Judgments by the common law were not liens upon real estate. The lien arose from the power given by the statute of Westminster to sue out an *elegit*. *Morsell v. First National Bank*,\* 1 Otto, 357.

§ 957. At common law a judgment for debt or damages could only be enforced against the goods and chattels and the present profits of the lands of the debtor. Possession of the lands could not be reached. Afterwards the statutes of Westminster 2, 13 Edw. I., ch. 18, gave the creditors the option to take a moiety of the debtor's land upon an *elegit*, to hold until the rents and profits would satisfy the judgment; and thereupon it was said that the judgment was a lien upon such lands. But this lien only conferred the right to levy upon such land within a

year and a day, the levy relating back to the date of the judgment and excluding intermediate incumbrances. The judgment creditor acquired no *jus in re*, but a mere power to make his general lien or privilege specific and effectual by an execution and levy. *In re Boyd*,\* 4 Saw., 262.

§ 958. As the lien of a judgment is given by the statute which authorizes an *elegit*, the lien depends on the right to sue out an *elegit*. *Bank of United States v. Winston*,\* 2 Marsh., 252.

§ 959. The lien of a judgment upon lands depends on the power to sue out an *elegit*, and therefore a judgment is no lien as long as the execution is stayed. The lien attaches from the time execution may issue. *Scriba v. Dearies*,\* 1 Marsh., 166.

§ 960. The lien of a judgment does not depend on the actual issue of an *elegit*, but on the right to issue an *elegit*. *Ibid*.

§ 961. There being no statute in Virginia which in express terms makes a judgment a lien upon the land of the debtor, the lien is the consequence of a right to take out an *elegit*. *United States v. Morrison*,\* 4 Pet., 124.

§ 962. Under the statute of Virginia providing that a judgment debtor may take out writs of *feri facias*, *elegit* and *capias ad satisfaciendum*; that a second execution may be issued if the first one is not returned executed; that upon the return of a *capias ad satisfaciendum* that the defendant is not found, a *feri facias* may issue; that after a return upon a *feri facias* that no goods or not sufficient goods are found, a *capias ad satisfaciendum* may issue; that where part of a debt is levied upon an *elegit*, a new *elegit* may issue for the residue; and that where *nihil* shall be returned upon any writ of *elegit*, a *capias ad satisfaciendum* or a *feri facias* may issue; and so, *vice versa*, it is held that the right to take out an *elegit* is not suspended by the suing out of a *feri facias*, and consequently the lien of the judgment continues pending the proceedings on that writ. *Ibid*.

§ 963. Judgments of federal courts.—The lien of judgments in the courts of the United States does not result from any direct legislation of congress on the subject. *Lombard v. Bayard*,\* 1 Wall. Jr., 196.

§ 964. Under the judiciary act of 1789, which ordains "that the laws of the several states shall be regarded as rules of decision at common law and in the courts of the United States," these courts have uniformly adopted the principles of state policy and jurisprudence on the subject of the lien of judgments so far as the same were applicable, treating them as rules affecting real property and its transmission. *Ibid*.

§ 965. The process, both mesne and final, in the district and circuit courts of the United States, being conformed to those of the different states in which they have jurisdiction, the lien of judgments on property within that jurisdiction depends upon the state laws where congress has not legislated on the subject. *Williams v. Benedict*,\* 8 How., 107.

§ 966. The act of the assembly of Pennsylvania limiting the lien of judgments to five years unless revived by *scire facias* is considered as a rule of property binding on the courts of the United States sitting in that state, although passed subsequent to 1789. *Lombard v. Bayard*,\* 1 Wall. Jr., 196.

§ 967. The Pennsylvania statute of 1798, limiting the lien of judgments, is a law of property and title applicable to judgments in the United States circuit court for the eastern district of that state, of record before its passage. *Thompson v. Phillips*, 1 Bald., 248.

§ 968. Extent of lien.—The judgments of federal courts are liens on the lands of the judgment debtors within their jurisdiction, though not recorded in the county in which the lands are situated. *Crandall v. Cropsey*,\* 10 N. Y. Leg. Obs., 1; *Cropsey v. Crandall*,\* 2 Blatch., 341.

§ 969. The judgments at law and decrees in chancery of the circuit court of the United States for the district of Illinois constitute a lien throughout the state on the real estate of the party against whom they are rendered. *United States v. Duncan*, 4 McL., 607.

§ 970. In Texas a judgment rendered by a federal court is a lien on all defendant's lands within the judicial district, although not recorded in the several counties where his lands are situated. *United States v. Scott*, 3 Woods, 834.

§ 971. It being the law of Pennsylvania that judgments of courts of record bind the lands of the debtor situated in the territorial jurisdiction of the court from the time of their rendition, a judgment of the circuit court of the United States is a lien upon the lands of the debtor throughout the district and takes precedence of a subsequent judgment of a state court rendered in the immediate county in which the land lies. *Lombard v. Bayard*,\* 1 Wall. Jr., 196.

§ 972. In 1789, when the circuit courts of the United States were established, judgments of courts of record in Pennsylvania bound the lands of the debtor situated within the territorial jurisdiction of the court for an indefinite period of time. *Ibid*.

§ 973. Under section 1 of chapter 159 and section 23 of chapter 160 of the General Statutes of Missouri of 1865, a judgment is not a lien on lands of the debtor situate in another county until execution is levied thereon. *Webster v. Woolbridge*,\* 3 Dill., 74.

§ 974. When a judgment is appealed from the common pleas to the supreme court, in Ohio, the judgment below remains a lien on the real estate of the defendant, in the county in which judgment is rendered; and it would seem that the accruing interest and costs and penalty ought also to be considered as an incident to that judgment. *McLean v. Lafayette Bank*, 4 McL., 480.

§ 975. A judgment of a court of record in Georgia is a lien upon all the real and personal property of the debtor within the state, from its date. *Plant v. Gunn*,\* 2 Woods, 372.

§ 976. What subject to lien.—A reversion after an estate for life is bound by a judgment against the ancestor from whom it immediately descends. And although the person must be seized at the time of obtaining the judgment or afterwards, both the life tenant and remainderman are considered to be seized. *Burton v. Smith*, 13 Pet., 464 (§§ 951-55).

§ 977. A judgment obtained by A. against B. constitutes no lien, either legal or equitable, upon a judgment owned by B. and against C. And in a bill by A. to have such judgment of B. applied on his judgment against B., and to enjoin C. from paying it over to B., he can have no relief beyond the equitable interest of B. in such judgment. And if B. really owns only one-fourth of it, and that much is paid to the complainant, he is entitled to nothing more. *Rhodes v. Farmer*,\* 17 How., 484.

§ 978. The La Crosse & Milwaukee Railroad Company having acquired, by virtue of its charter and the proceedings under it, a title in fee to the road-bed, and the rolling stock having been declared a fixture by express statute of the state, it is held that a judgment against the company is a lien on its road-bed and rolling stock, judgments being a lien on real estate of the defendant by law. *Railroad Co. v. James*,\* 6 Wall., 750.

§ 979. A judgment at law is not a valid lien on land conveyed by the judgment debtor before the rendition of the judgment by a conveyance valid as between the parties. *Miller v. Sherry*, 2 Wall., 287.

§ 980. In Tennessee leasehold interests are real estate so far as concerns judgments and executions, and are bound by the lien of a judgment. *Dawson v. Daniel*,\* 2 Flipp., 310.

§ 981. Under the construction of the Ohio statutes by the supreme court of that state, permanent leasehold estates are land within the execution law and bound by judgment. *McLean v. Rocky*, 3 McL., 235.

§ 982. By the law of Mississippi a judgment is a lien upon the personal as well as the real property of the defendant from the time of its rendition. *Brown v. Clarke*,\* 4 How., 4.

§ 983. Under the statutes of Indiana judgments bind not only the lands of the debtor owned by him at the rendition thereof, but also his subsequently acquired lands, from the moment of their acquisition. The sale of such subsequently acquired lands does not divest the lien, and the purchaser of such subsequently acquired lands has no right to compel satisfaction of the judgment out of lands owned by the debtor when the judgment was rendered. *Barth v. Makeever*, 4 Biss., 206.

§ 984. The lien of a judgment only attaches to the property belonging to the judgment debtor at the time the same is docketed and filed, and does not extend to an equity or an equitable title. *In re Estes*, 6 Saw., 459.

§ 985. The common law upon the subject prevailing in that part of the District of Columbia, a judgment at law is not a lien upon real estate in the city of Washington, which, before the rendition of the judgment, has been conveyed to trustees with a power of sale to secure the payment of debts of the grantor described in the deed of trust. *Morsell v. First National Bank*,\* 1 Otto, 357.

§ 986. A conveyance by a grantor, though fraudulent as to creditors, is binding upon him, so that there is no estate, either legal or equitable, remaining in him upon which a judgment lien could attach. *In re Estes*, 6 Saw., 459.

§ 987. Where a statute provides that a conveyance of property in fraud of creditors "shall be void," a judgment creditor acquires no lien on property thus fraudulently conveyed, to entitle him to any preference over other creditors of the bankrupt when the fraudulent sale is set aside. Until the sale is actually set aside, the judgment creditor has merely an equitable right the same as other creditors, the title remaining in the grantee notwithstanding the words of the statute. *In re Estes*, 5 Fed. R., 60; *In re Estes*, 6 Saw., 459.

§ 988. A judgment lien against land that is held by a fraudulent grantee at the time of the rendition of the judgment against the fraudulent grantor ceases to operate when the land is transferred to an innocent purchaser without notice, and an assignee in bankruptcy who acquires the land from the innocent purchaser takes it also free from the lien. *Wood v. Wright*,\* 9 Biss., 365.

§ 989. The lien of a judgment is general, and attaches only to the actual interest of the holder of the legal title to lands, and such a lien is subordinate to the right of the owner of lands in possession who has been compelled by duress to convey to the judgment debtor. *Brown v. Pierce*, 7 Wall., 205; *Baker v. Morton*, 12 Wall., 150.

§ 990. Not a title to or claim on the land.—The lien of a judgment is no title to or claim on the land. It is no title against which the statute of limitations can run. *Kemper v. Adams*,\* 5 McL., 507.

§ 991. Conveyance of land after the lien of a judgment has attached to it does not affect the lien. *Ibid.*

§ 992. It is not understood that a general lien by judgment on lands constitutes *per se* a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to dispose of the land. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386.

§ 993. The lien of a judgment confers a right to levy on the land of the judgment debtor to the exclusion of other adverse interests acquired subsequently to the judgment, but the lien constitutes no property or right in the land itself, as it is merely a general lien securing a preference over subsequently acquired interests in the property. *Baker v. Morton*, 12 Wall., 150.

§ 994. Date of lien.—A judgment binds real estate from the first day of the term at which it is rendered. *McLean v. Rockey*, 8 McL., 235.

§ 995. A state may properly provide that the judgment in a suit on an administrator's bond shall be a lien from the day of the commencement of the suit. *Voyles v. Parker*, 9 Biss., 326.

§ 996. The lien of a judgment on which execution is stayed dates not from the time of its rendition, but from the time when execution may be sued out. *Bank of United States v. Winston*,\* 2 Marsh., 252.

§ 997. Docketing.—Under the code of Oregon the lien of a judgment arises not from the judgment itself, but from the docketing thereof, and being the creature of the statute such lien cannot exist unless the statutory requisites have been complied with. *In re Boyd*,\* 16 N. B. R., 137.

§ 998. Judgment creditors in California acquire a lien by docketing their judgments, although the defendant's land is at the time in the hands of trustees by a fraudulent assignment; and upon such fraudulent conveyance being subsequently set aside, the property in the hands of the assignee in bankruptcy is subject to all liens of such judgments docketed before the proceedings in bankruptcy. *In re Beadle*, 5 Saw., 351.

§ 999. A judgment docketed on a day declared to be a legal holiday is void, and constitutes no lien on land. *In re Worthington*,\* 3 Cent. L. J., 526; 14 N. B. R., 385. Reversed, S. C., 16 N. B. R., 52.

§ 1000. Lapse of time.—A promise by the *bona fide* purchaser of land to pay a judgment which is a lien upon it does not extend the lien, and after the lapse of the time during which, under the statute, the judgment is a lien on the land, no sale thereof can be had under the judgment, though the time was suffered to elapse in consequence of such promise. *Norris v. Johnson*, 9 Wall., 125.

§ 1001. Cessation of lien.—The judgment lien upon the lands of an insolvent debtor is not destroyed by the fifth section of the insolvent act, although there is no process of execution thereupon, in the hands of the marshal, at the time of the debtor's application for relief under the act. *Farmers' Bank of Alexandria v. Robbins*, 2 Cr. C. C., 471.

§ 1002. A judgment on which execution is issued and returned levied on property released by order of the plaintiff, in consequence of a compromise between the parties, is no longer a lien on the lands of the debtor. *Scriba v. Deanes*,\* 1 Marsh., 166.

§ 1003. Where the lien of a judgment has ceased on account of the release by the plaintiff of property taken in execution, a mortgage by the judgment debtor to the judgment creditor of the same property to secure the same debt cannot be connected with the judgment so as to continue its lien, though the giving of such mortgage was the consideration for the release of the property from execution. *Ibid.*

§ 1004. A covenant not to resort to a judgment which is not perpetual does not amount to a release and does not discharge the lien created by the judgment. *Ibid.*

§ 1005. An act declaring that any judgment heretofore or hereafter rendered shall cease to operate as against a subsequent *bona fide* judgment creditor, if execution is not issued on it within a year after its rendition, is not, when applied to judgments rendered before its passage, an *ex post facto* law, nor does it impair the obligation of contracts. *Bank of the United States v. Longworth*,\* 1 McL., 35.

§ 1006. A statute declaring that no judgment, on which an execution shall not be taken out within a year, shall operate as a lien upon the estate of the judgment debtor to the prejudice of any *bona fide* judgment creditor, protects the purchaser at the execution sale under such subsequent judgment to the same extent as it protects the judgment creditor. *Ibid.*

§ 1007. Section 967, Revised Statutes of United States, which is a re-enactment of part of section 4, act of July, 1840, enacts that federal judgments in any state shall cease to be liens on

realty, in the same manner and at like periods as the judgments of the courts of such state shall cease to be liens. At the time that act was passed, in 1840, there was no statute in New York, giving the right to a party taking an appeal to apply for a suspension of the lien of a judgment against him. In 1851, however, that right was given by act, which made it discretionary with the court to suspend the lien. *Held*, that the federal court was governed by the law as it existed in 1840, and did not possess discretionary power in the matter. *Myers v. Tyson*,\* 13 Blatch., 242.

§ 1008. *Effect of arrest by ca. sa.*—In New York it is held that the lien of a judgment is suspended during the imprisonment of the judgment debtor upon a *capias ad satisfaciendum*; so that a judgment obtained by another creditor during that time is a prior lien on the debtor's property; or the debtor may sell his property and give the purchaser a title unincumbered by the judgment. *Griswold v. Hill*, 2 Paine, 492 (§§ 1844-47).

§ 1009. So long as the body of a defendant taken upon a *capias ad satisfaciendum* remains in prison, the creditor cannot resort to the property of the debtor, and the judgment will not be considered a lien as against other creditors. *Ibid*.

§ 1010. A discharge from commitment upon a *ca. sa.* under the insolvent act of the District of Columbia is no discharge of the debt; but the plaintiff may resort to the lien of his judgment upon the lands of his debtor, although sold and conveyed away by him while the plaintiff was pursuing his remedy against the person of his debtor, and although the plaintiff had obtained judgment against him and his sureties upon his prison-bonds bond. *Owen v. Glover*, 2 Cr. C. C., 578.

§ 1011. A party charged under a *ca. sa.* was released upon taking the oath of insolvency, under act of January 6, 1800 (2 U. S. Stats. at Large, 4). *Held*, that said oath did not revive the lien in favor of the judgment creditor extinguished by the *ca. sa.* *Snead v. McCoull*,\* 13 How., 407.

§ 1012. By the act of Virginia of 1748, the lien of a judgment depends entirely on the capacity of the plaintiff to sue out an *elegit*, and by electing a *ca. sa.* the lien is inoperative except in the instance of death or escape. By subsequent statute, passed in 1819, all sales, conveyances or transfers of lands by a person in execution for any debt or damages are made null and void as to the creditor, unless such sale be made for the payment of the obligation to such creditor; and all executions of *ca. sa.* are made to bind the real estate of defendant from the time they shall be levied. A. recovered a judgment against B., elected to sue out a *ca. sa.* in 1817, and in 1821 B. took the poor debtor's oath, and was released from prison. In 1821, prior to B.'s release, C. recovered judgment against him also, and a *ca. sa.* was levied against his body. B. died shortly after his discharge in 1821. The question of the priority of A. or C. as to the property of B. arising, it was held that A. by levying his *ca. sa.* released the judgment lien upon B.'s lands, and that the lien so surrendered was not revived by B.'s death, inasmuch as it was not a dying in custody; and that under the act of 1819 C.'s was the only lien on the lands of B., and that he was entitled to whatever benefits might ensue therefrom. *Ibid*.

§ 1013. *Equitable control of.*—Though a judgment obtained subsequent to a contract for the sale of land in a strict legal view of the case becomes a lien upon the land, yet if justice can be done both the judgment creditor and the purchaser, equity will control the effect of the judgment so as to protect the equitable right. *Lane v. Ludlow*, 2 Paine, 591.

§ 1014. *On rents and profits.*—Bill to remove an incumbrance so that land may be sold to satisfy a judgment; appointment of receiver of rents and profits; such rents and profits subject in equity to the lien of the judgment. *United States v. Butler*,\* 2 Blatch., 201.

§ 1015. *Decrees in admiralty.*—Decrees in admiralty are not a lien upon the lands of the debtor. *Ward v. Chamberlain*,\* 9 Am. L. Reg., 171. See §§ 926-29, *supra*.

§ 1016. *Decrees in chancery.*—In Virginia a decree in chancery is a lien on lands equally with a judgment at law. *Scriba v. Deanes*,\* 1 Marsh., 166.

§ 1017. *Delivery of execution.*—By the statute of frauds and perjuries of Car. 2, chapter 3, section 16, a writ of *fi. facias* binds the property of the defendant from the time it is delivered to the marshal, and the first execution which comes into the hands of the marshal must be first satisfied. This is also true of an *alias* execution if the original has been returned. Nor will it make any difference that the execution has been levied on a part of the property of the defendant, and such property has been delivered over to the judgment creditor without a sale, in part satisfaction of the debt. *Cunningham v. Offutt*,\* 5 Cr. C. C., 524.

§ 1018. A judgment does not bind lands in the state of Kentucky. The lien attaches only from the delivery of the execution to the sheriff. It then binds real and personal property held by legal title. *Bank of the United States v. Tyler*, 4 Pet., 366.

§ 1019. The lien upon the personal property of the debtor, created by the delivery of a *fi. fa.* to the marshal, is lost by the return of *nulla bona*; and it is not revived by the delivery of an *alias fieri facias* to the marshal, so as to overreach an intermediate sale by the debtor. *Maul v. Scott*, 2 Cr. C. C., 367.

§ 1020. Under the laws of Kentucky, a lien upon the property of a debtor is created by the delivery of an execution to the sheriff, that continues while it remains in the hands of that officer to be executed; and a creditor is not deprived of this lien by an act of bankruptcy committed by the debtor before levy made but after execution issued. *Waller v. Best*,\* 3 How., 111.

§ 1021. Under the laws of New York the goods and chattels of an execution debtor situated within the jurisdiction of the sheriff are bound, as against the debtor, from the time of delivery of the execution to the sheriff to be executed, and without any levy. Where there was no levy, an assignee in bankruptcy took subject to such lien and was bound to sell such property separately and apply its proceeds to its extinction. *In re Paine*,\* 17 N. B. R., 37.

§ 1022. Under the bankrupt act, when property has been attached and judgment taken and execution issued before the petition in bankruptcy, but after the act of bankruptcy, the lien of the execution is valid in the absence of fraud or collusion. *Downer v. Brackett*,\* 21 Vt., 599.

§ 1023. An execution was delivered to the sheriff before the judgment debtor filed his petition in bankruptcy. No actual levy was made and the assignee in bankruptcy took possession of the property. Before the return day the judgment creditor proved his claim against the estate of the bankrupt as a debt secured by the lien of the execution. *Held*, the execution constituted a lien, and that as the debt was proved before the return day the lien continued after the return day, though no actual levy was made before that day. *In re Stockwell*,\* 18 N. B. R., 144.

§ 1024. Where an execution lien has been obtained in good faith before bankruptcy, on the individual property of a member of a partnership, under a judgment against the firm, such statutory lien will not yield to the equities of the separate creditors of that partnership. *In re Sandusky*,\* 17 N. B. R., 452.

§ 1025. Under the statute law of Colorado a judgment creditor has a lien upon personal property from the time the execution is delivered into the hands of the sheriff, and such lien is good against bankrupt proceedings instituted after the delivery and before the levy of the execution. *Bartlett v. Russell*, 4 Dill., 267; 16 N. B. R., 211.

§ 1026. Under the statutes of New York the goods and chattels of the judgment debtor are bound by the execution from the time it is issued to the sheriff to be executed, although no levy is made, except as against *bona fide* purchasers for value and subsequent judgment creditors. This lien is preserved by the bankrupt law if it is existing at the time of the filing of the petition. Hence executions cannot be considered dormant by reason of instructions given to the sheriff to delay the levy, after they were placed in his hands; and the fact that the last levy may have been after the filing of a petition in bankruptcy is immaterial and does not affect the lien of the judgment creditor as against the assignee in bankruptcy. *Crane v. Penny*, 2 Fed. R., 187.

§ 1027. An assignee in bankruptcy takes the property subject to existing liens. Not being a purchaser for value he cannot avail himself of the objection that the execution is dormant, since the bankrupt himself could not do so. *Ibid*.

§ 1028. The delivery of an execution to the officer does not give the officer any property in the goods of the defendant, but only a lien which binds the goods in the hands of the execution debtor, or of any one to whom he may voluntarily convey them; but such lien will hold neither the goods nor their proceeds in the hands of an officer who has seized them under process from a court of competent jurisdiction, at the instance of another creditor. As between such different writs, the one first executed will take the goods without regard to the dates of the writs, or the time of their delivery to the officers. The lien given by such delivery binds the goods against a voluntary transfer, but not one made under legal process. And a seizure of the goods of an execution creditor by a marshal, under a warrant of seizure in bankruptcy proceedings, divests the lien of an unlevied execution. *In re Tills*,\* 11 N. B. R., 214.

§ 1029. Levy of execution.—An execution returned is no lien on any property not levied on; and no new lien can be acquired until a new execution is put into the hands of the sheriff, and none can issue while a former levy is in force; hence the debtor may alienate his property in the interval between judgment and the execution reaching the hands of the sheriff. *Bank of United States v. Tyler*, 4 Pet., 366.

§ 1030. An execution is not levied so as to give a lien against purchasers or creditors, if the property is permitted to remain with the debtor. The lien is lost by suffering the property to remain with the debtor as his own until a subsequent execution is levied, or a *bona fide* sale is made. *Barnes v. Billington*, 1 Wash., 29.

§ 1031. Where an execution is levied on property subject to attachments against it to more than its value, the execution creditor obtains no lien which entitles him to claim as a preferred creditor on the dissolution of the attachment by the filing of a petition in bankruptcy. *In re Steele*,\* 16 N. B. R., 105.

§ 1032. An attaching creditor who procures judgment and levies execution, subject to



prior attachments which do not amount to the value of the property, secures a valid lien, and, on the dissolution of the prior attachments by the filing of a petition in bankruptcy, is entitled to priority. *Ibid.*

§ 1033. A sheriff having an execution levied on a stock of goods indorsed the levy on the writ, but was instructed by the plaintiff not to close the store but to put some one in charge. During the temporary absence of the custodian from the store, a marshal levied under process in bankruptcy proceedings. *Held*, that the first levy remained good, and that it gave the executing creditors a lien which must be first satisfied. *In re Hughes*,\* 11 N. B. R., 452.

§ 1034. Where property which has been attached is subsequently levied on by execution, the dissolution of the attachment by bankruptcy proceedings does not enlarge the lien of the execution, and the assignee takes the property freed from the lien of the attachment and subject to the execution only to the extent it was subject to it before the dissolution of the attachment. *In re Nelson*,\* 16 N. B. R., 312.

§ 1035. An execution executed upon the estate of the debtor previous to an act of bankruptcy gives a lien to the execution creditor, provided the levy be real and *bona fide*. *Bardes v. Billington*, 1 Wash., 29.

§ 1036. While a sheriff had the property of H. in his possession under an attachment in favor of W., an execution was delivered to the sheriff on a judgment against H. in favor of C. Afterwards, on the same day, H. filed his petition in bankruptcy. *Held*, that, independent of any actual levy by the sheriff on the execution, the delivery of the execution to the sheriff was equivalent to a levy, and, as the bankruptcy vacated the attachment, the execution constituted a valid lien which must be satisfied by the assignee in bankruptcy. *In re Hull*, 14 Blatch., 257; 18 N. B. R., 1.

§ 1037. Where, after levy of *fi. fa.* on real estate, the plaintiff orders a stay of proceedings, the lien of the judgment is not lost. *Contra*, where personal property is levied upon and left in the hands of the defendant. *Green v. Allen*,\* 2 Wash., 280.

§ 1038. Priority of judgments.—All judgments rendered at the same time have equal liens on the real estate of the defendant, however the executions may have been issued and levied, provided the levy has been within a year from the rendition of the judgment. *McLean v. Rockey*, 3 McL., 235.

§ 1039. As a general principle an elder judgment is entitled to prior satisfaction; a sale under a younger judgment does not affect the prior one, or prevent a sale under it so as to pass the title. *Thompson v. Phillips*, 1 Bald., 246.

§ 1040. A judgment does not relate back to the verdict. So where there was a verdict for the plaintiff, subject to the opinion of the court, and judgment was afterwards rendered for the plaintiff, but in the interval judgments were rendered in favor of other parties against the defendant, and the money made, it was held that the plaintiff could not claim the money so made on the judgments of the other persons on the ground that his judgment related back to his verdict. *Bank of the Metropolis v. Walker*,\* 2 Cr. C. C., 361.

§ 1041. Where the right of priority as between judgments depends upon priority of actual seizure, and legal custody of the property as between the judgment of a state and a federal court, that will have priority which is first levied by seizure of the property. *Brown v. Clarke*,\* 4 How., 4.

§ 1042. Where land was sold under an execution, and the money arising therefrom about to be distributed amongst creditors by an order of the United States circuit court, a controversy between the creditors as to the priority of their respective judgments cannot be taken to the United States supreme court, either by appeal or writ of error. *Bayard v. Lombard*, 9 How., 530.

§ 1043. Where a statute makes a judgment a lien upon the lands of the judgment debtor for a certain length of time, such lien is not divested by a levy and sale under a subsequent judgment made during the continuance of the first lien. In such a case a purchaser under the second execution and first judgment takes the title as against a purchaser under the first execution and second judgment. *Rankin v. Scott*,\* 12 Wheat., 177.

§ 1044. On the 1st of May, 1858, plaintiff's assignor obtained judgment against the La Crosse & Milwaukee Railway Company for a large sum. Execution issued, and in 1859 the sheriff sold the property now in controversy as the property of the judgment debtor, to the plaintiff to whom the judgment had been previously assigned, and by deed conveyed said property to him, which deed was duly recorded. Plaintiff, however, never obtained possession of the property. There were prior liens in existence against said property at the time of the recovery of the plaintiff's judgment, among them a judgment in favor of one Cleveland, entered October 7, 1857. In 1866, one James, assignee of the Cleveland judgment, filed his bill against the party in possession of the property to enforce the lien of his judgment and have the property sold, the plaintiff in this action not being made a party to the suit. In 1867 a decree was entered in that cause, to the effect that there was due on the Cleveland judgment \$98,801.51,

and that the same was a lien and incumbrance, as of date of October, 1857, upon the property in controversy, and also provided for a sale of the same. Pursuant to the decree, a sale was made to the defendant in this suit, and subsequently confirmed, and defendant has since been in possession. *Held*, that the purchaser under the decree founded upon the first judgment takes the paramount legal title, even though such sale is not made until after a prior one under the posterior lien. *Howard v. The Milwaukee & St. Paul R'y Co.*, \* 7 Biss., 78.

§ 1045. One claiming under a sale under a judgment brought suit in ejectment against another in possession of the premises claiming under a subsequent sale under a prior judgment. *Held*, that he could not recover, though the subsequent sale under the prior judgment was made through proceedings in equity to which the plaintiff was not made a party. *Howard v. Railway Co.*, \* 11 Otto, 887.

§ 1046. The revival of a judgment which has become dormant creates a lien on the land of the debtor, but not as against liens prior in time to the revival. *Tracy v. Tracy*, \* 5 McL., 456.

§ 1047. By the law of North Carolina a sale under a junior judgment passes a title unaffected by the lien of a prior judgment which has not been enforced against the land. But this is not the rule where one is a judgment of a state and the other of a United States court. *Whitely v. Riddick*, \* Chase's Dec., 540.

§ 1048. Where two judgments are rendered in the same court against the same defendant, it seems that the court may, upon motion, make an order appropriating money made on the junior judgment to the satisfaction of the elder and superior lien. But a court of the United States cannot make such an order upon a motion for the appropriation of money made on its judgment to the payment of a judgment of a state court. *Ibid*.

§ 1049. The seventeenth section of the act of the legislature of Ohio, of February 4, 1824, provides that "no judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien upon the estate of any judgment debtor to the prejudice of any *bona fide* judgment creditor." The supreme court of the state hold that this act applies to judgments rendered before its passage. A purchaser under an execution issued in 1828 on a judgment rendered in 1818 brought suit to eject a purchaser under a judgment rendered against the same defendant in 1830, on which last judgment execution was issued within the year. It was held that, although at the time the levy was made under the junior judgment the elder judgment had the preferable lien, the law at that time not requiring the execution to issue within any limited time to continue the lien, yet as the execution had not been issued on the elder judgment until after the act of 1824, such elder judgment and the execution thereon and sale thereunder could not operate as against the second judgment and the purchaser under it. *Bank of United States v. Longworth*, \* 1 McL., 85.

§ 1050. The act of the assembly of Pennsylvania passed in 1772, which, as to judgments, is an exact copy of the English statute of frauds, enacts in substance that judgments shall not relate back or be a lien on land, as against *bona fide* purchasers and mortgagees, but from the time they are signed and enrolled. The subsequent act of April 4, 1798, provides that no judgment shall continue a lien beyond five years from the time it is rendered, unless within that period a *scire facias* be sued out and prosecuted in the manner prescribed by law. In construing these two acts together, it is held that the latter applies in favor of *bona fide* purchasers and mortgagees only, and not in favor of subsequent judgment creditors, and that a subsequent judgment creditor cannot resist the lien of a prior judgment upon the ground that it has been lost by failure to sue out a *scire facias* within the five years. *Hurst v. Hurst*, \* 2 Wash., 69.

§ 1051. By statute, in Ohio, it is declared that if execution is not levied on a judgment within a year after its rendition it shall not operate as a lien on the debtor's lands to the prejudice of any other *bona fide* creditor. Hence, where A. recovered a judgment on which execution was not issued against the tract of land concerning which controversy arose, and three years afterwards B. and C. recovered judgments, in the order named, within a few months of each other, and one month after the latter judgment their debtor was adjudged a bankrupt, it was held that A.'s judgment had lost its lien as against those of B. and C.; but less than a year having elapsed since the rendition of B.'s judgment, it had not lost its lien as against C.'s; and no levy under either having taken place they must be paid in the order of their rendition. *Pence v. Cochran*, \* 6 Fed. R., 269.

§ 1052. The commonwealth of Virginia having recovered a judgment against a debtor, before execution was issued an act was passed by the legislature directing that execution should be delayed on the debtor's giving sufficient surety for the payment of the debt by instalments. Such a bond having been given and a judgment recovered thereon, it was held that the commonwealth and those claiming under her must abide by or abandon the original judgment, and could not claim the advantages of both in equity, and that the surety who had

paid the judgment on the bond could not claim to be subrogated to the rights of the commonwealth under the original judgment, so as to take priority over intermediate judgments. *Bank of United States v. Winston*, \*2 Marsh., 252.

§ 1053. By the law of Pennsylvania land may be sold under a junior judgment without impediment from an earlier one, and the purchaser will take the land discharged of the prior judgment, unless the sale is expressly made subject to the earlier judgment. *United States v. Mechanics' Bank*, \* Gilp., 51.

§ 1054. Under the Indiana statute, making a judgment a lien on the real estate of the defendant from the time of its rendition to the expiration of ten years, judgments rendered on the same day are equal liens, irrespective of the diligence that may be used to enforce them. *Rockhill v. Hanna*, \*4 McL., 554.

§ 1055. — **forthcoming bond.**— Under the law of Mississippi, a forthcoming bond is intended as a substituted security for the lien acquired by the judgment and seizure. And where property seized on execution is released on the giving of a forthcoming bond, the lien of a judgment is extinguished so as to let in the lien of a junior judgment as a preference, if such junior judgment is rendered prior to an entry of judgment on the forthcoming bond. The subsequent quashing of a forthcoming bond, and the judgment thereon, will not change the priority of the liens, unless the bond and judgment upon it be considered as nullities. In the latter case the lien of the original judgment will remain unaffected. *Brown v. Clarke*, \*4 How., 4.

§ 1056. — **mortgage.**— A judgment has relation to the first day of the term at which it is rendered, and from that time constitutes a lien on the lands of the defendant lying within the jurisdiction of the court. So (in Ohio) where a judgment is entered one day before the recording of a mortgage under the act of 1881, it constitutes a prior lien to the mortgage, said act providing that a mortgage shall only take effect from the time it is left for record. *Sturgess v. Bank of Cleveland*, 8 McL., 140.

§ 1057. In Wisconsin a judgment is a lien upon the real estate of the defendant from the time of its rendition, and may be enforced against it although it has been sold under a subsequent mortgage. *Railroad Co. v. James*, \*6 Wall., 750.

§ 1058. By the laws of Ohio, a judgment is a lien from the first day of the term on which it is rendered. *Held*, that a judgment against a railroad company for damages for killing the plaintiff's intestate is not a lien on the real estate of the company, which was sold on the foreclosure of a mortgage, and the sale confirmed, prior to the first day of the term on which the judgment was rendered, nor is it a lien on the proceeds of such sale, notwithstanding a law that judgments of that character should be a lien superior to that of the mortgage on which such foreclosure took place. *Jeffrey v. Moran*, 11 Otto, 285.

§ 1059. Where a judgment which leaves the amount of interest blank is subsequently amended from the verdict, which gives interest from a certain day, such amended judgment relates back to the original judgment and takes precedence of an intermediate mortgage made and taken to secure an antecedent debt. In such a case the record carries notice of the right of the holder of the original judgment to have it amended. *Plant v. Gunn*, \*7 Fed. R., 751.

§ 1060. Under the law of Ohio declaring that "the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor from the first day of the term at which such judgment shall be rendered," and that "mortgages do and shall take effect and have preference from the time the same are delivered to the recorder of the proper county to be by him entered on record," it is held that a judgment takes precedence of a prior mortgage which is not deposited for record until after the first day of the term at which such judgment was rendered. *Bank of Cleveland v. Sturges*, \*2 McL., 341.

§ 1061. The lien of a judgment is cut off by the foreclosure of a prior mortgage upon the property upon which the mortgage was a lien. *Bronson v. La Crosse Railroad Co.*, 2 Wall., 289.

§ 1062. By the laws of Mississippi, deeds of trust and mortgages are valid as against creditors and purchasers only from the time they are recorded; and a judgment is a lien from the time of its rendition. Hence, where a judgment was rendered in the interval between the execution and recording of a deed, it was a lien upon the land of the debtor. *Taylor v. Miller*, 13 How., 287.

§ 1063. An equitable mortgage is a paramount lien to a subsequently rendered judgment. *First National Bank v. Caldwell*, 4 Dill., 814.

§ 1064. An equity of redemption is subject to the lien of a judgment, and such lien is prior to that of a subsequently executed mortgage. *First National Bank v. Morsell*, \*1 MacArth., 155.

§ 1065. — **conveyance.**— The lien of a judgment creditor or of a mortgagee without notice is superior in Texas to the unrecorded deed of a vendee of the defendant in execution. *Daggs v. Ewell*, 3 Woods, 844.

§ 1066. — **homestead right.**— Although in Virginia a claim for rent is superior to the homestead right, a judgment being inferior to such right, a landlord waives his right of pri-

ority by obtaining a judgment *for debt* on his claim for rent. *In re Lumpkin*, 2 Hughes, 175.

§ 1067. **Priority of executions.**—Where a constable receives an execution, but does not levy till after a levy is made by a sheriff on an execution delivered to him after the one was delivered to the constable, the lien of the execution held by the constable is subordinate to that of the sheriff, but both are superior to a subsequent levy by a marshal. *In re Hughes*,\* 11 N. B. R., 452.

§ 1068. A *fi. fa.* first delivered to the marshal will supersede a *fi. fa.* delivered to a constable subsequently, but first levied. *Riddle v. The Marshal of the District of Columbia*, 1 Cr. C. C., 96.

§ 1069. When a sheriff first levies on personal property under a state judgment, there is a prior lien over a levy made on the same property by a United States marshal. *Earl v. Raymond*, 4 McL., 288.

§ 1070. The law of Indiana declares that goods and chattels shall be bound by an execution from the time it is delivered to the officer; that "the sheriff receiving an execution shall indorse thereon the year, month, day and hour when he received it;" that "when any property levied on remains unsold it shall be the duty of the sheriff when he returns the execution to return the appraisalment therewith, stating in his return the failure to sell and the cause of the failure;" and that "the lien of the levy upon the property shall continue, and the clerk, unless otherwise directed by the plaintiff, shall forthwith issue another execution, reciting the return of the former execution, the levy and failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient; if not, then out of any other property of the debtor subject to execution." Under these provisions it is held that where no levy is made under the first execution, an *alias* issued on the return of the first does not continue the lien of the first, but is a lien only from the time of its delivery to the sheriff, and must be postponed to an execution of another creditor which is delivered to the sheriff before the *alias*, even though it be after the delivery of the original. *Kregelo v. Adams*,\* 9 Biss., 848.

§ 1071. The lien of an execution under the laws of a state commencing from the delivery of the writ to the sheriff, and the lien in the courts of the United States depending upon the delivery of the writ to their officer, and no provision being made by the statutes of the state or of the United States for the determination of the priorities between creditors obtaining judgments in the respective courts, state and federal, the tribunal which first acquires possession of the property by seizure by its officer may dispose of it so as to oust a title in the purchaser discharged of the claims of creditors whose judgments were obtained in the other tribunal. *Pulliam v. Osborne*,\* 17 How., 471.

§ 1072. Where an execution on a judgment against a partnership is placed in the hands of the marshal before the bankruptcy of the firm, it constitutes a specific lien on the property of the firm and of an individual member thereof, which is not divested by the bankruptcy. Such lien is superior to the claim of a marshal for charges not relating to the goods to which the lien attaches. *In re Wheeler*,\* 18 N. B. R., 385.

§ 1073. — **bottomry bond.**—If the obligee of a bottomry bond suffer the ship to make several voyages without asserting his lien, and executions are levied upon the ship by other creditors, the obligee loses his lien on the ship. *Blaine v. The Ship Charles Carter*, 4 Cr., 328.

§ 1074. **Bankruptcy.**—Where a judgment debtor was adjudged a bankrupt, it was held that the rights of his judgment lien creditors must be determined as of the date of the adjudication of bankruptcy. *Pence v. Cochran*,\* 6 Fed. R., 269.

§ 1075. Liens of judgments on which valid executions are issued and levied before the commencement of bankruptcy proceedings were protected by the bankrupt act. *In re Smith*, 2 Ben., 482.

§ 1076. A judgment lien is good under the bankrupt law, and, being prior to a mortgage, must be satisfied first. *McLean v. Lafayette Bank*, 3 McL., 587.

§ 1077. A judgment creditor whose judgment is a lien on the lands of the debtor waives such lien by proving his debt against the estate of the debtor in bankruptcy. *Briggs v. Stephens*,\* 7 Law Rep., 281.

§ 1078. **Miscellaneous.**—*Held*, in Kentucky, in 1844, that a judgment rendered is not a lien upon the land of defendant. *Waller v. Best*,\* 3 How., 111.

§ 1079. From the earliest history of Pennsylvania judgments have been considered as liens upon land, not by adoption of the statute of Westminster or statute of *elegit*, nor by virtue of the statute of 2 Geo. II., but because from the first settlement of the colony all lands and houses whatsoever have been liable to sale upon judgment and execution. *Lombard v. Bayard*,\* 1 Wall. Jr., 196.

§ 1080. A judgment gives the judgment creditor a lien on the debtor's lands, and a preference over all subsequent judgment creditors. But the law defeats the preference in favor of

the United States in cases specified in the act of 1799, chapter 128, section 65. *Thelasson v. Smith*, 2 Wheat., 396.

§ 1081. Where there is no statute to the contrary, a lien acquired by a valid levy during the life-time of the writ subsists, though no sale be made under the writ; and the levy being returned, it may, after the return day, be enforced by a *venditioni exponas*. The general statute of Missouri of 1865, page 646, declaring, in section 51, that "In all cases where an execution is or shall be issued and levied by the proper officers upon real estate, and for any cause a sale of such real estate shall not be made at the next term of the court of the county in which such sale is to be made, the execution and lien created thereby shall remain and continue in force until the end of the second term of the court of the county where the land is situated, and until a term of said court is held at which said real estate may be sold according to law;" and, in section 52, that "Where an execution is issued from a court of record in one county, and sent to the sheriff of any other in this state, and the same is levied on real estate, and from any cause the circuit court of the last mentioned county shall not be held before the return day of the execution, the sheriff shall retain said execution, and the levy made by virtue thereof shall remain in full force until there shall be a term of the circuit court in said last mentioned county at which said real estate may be sold," are entirely consistent with this common law doctrine. *Webster v. Woolbridge*,\* 3 Dill., 74.

§ 1082. Where a creditor has obtained a judgment which is a lien on the land of a debtor, a provision of a state constitution subsequently adopted exempting the land to which the lien has attached from execution is invalid as impairing the obligation of the contract. *Gunn v. Barry*, 15 Wall., 610.

§ 1083. Under section 266 of the code of Oregon, making a judgment a lien by reason of the docket entry thereof only "during the time an execution may issue thereon," a judgment containing a provision that no execution shall issue to enforce the same cannot be a lien. *In re Boyd*,\* 4 Saw., 262; 16 N. B. R., 137.

§ 1084. In Mississippi, a plaintiff who has obtained a judgment against the administrator of an intestate's estate, before it has been declared insolvent, has not such a prior lien on the same as will entitle him to issue execution and satisfy his judgment out of the assets, after the estate has been declared insolvent by the orphans' court and commissioners appointed for the distribution of the assets equally among all the creditors. *Williams v. Benedict*,\* 8 How., 107.

§ 1085. Courts of probate in Connecticut are courts of record, and full faith and credit are due to their orders and decrees and the recitals therein, if such orders and decrees are not void on their face, until they have been reversed, or in some way set aside, vacated or appealed from. *Segee v. Thomas*, 2 Blatch., 427.

## VI. JUDGMENTS OF SISTER STATES.

**SUMMARY**—*Prior to adoption of constitution*, § 1086.—*Faith and credit generally*, §§ 1087, 1100, 1106.—*Plea of nil debet*, § 1088.—*Question as to jurisdiction*, §§ 1089-1091, 1097, 1103.—*Plea of fraud*, § 1092.—*Limitations*, §§ 1093-1095.—*Conclusive only as regards the merits*, § 1095.—*Settlement of estates of deceased persons*, § 1096.—*Contradiction of the record*, §§ 1097, 1103.—*Appeal lies from decision of question*, § 1098.—*Extrinsic evidence*, § 1099.—*Authentication*, § 1100.—*Judgments by attachment*, § 1101.—*Questions as to service of process*, §§ 1102-1105.—*Service by publication*, § 1103.—*Foreign attachment*, § 1104.—*Questions of jurisdiction and notice remain open*, § 1106.—*Personal service or appearance necessary*, §§ 1107, 1110.—*Suit against partnership; one partner not served*, §§ 1108, 1109.—*Service in suits against corporations*, §§ 1110-1114.—*Suits against joint debtors*, § 1115.

§ 1086. Prior to the adoption of the confederation or the constitution of the United States, the several states were considered as entirely independent of each other; and the judgments recovered in their respective courts were foreign judgments in every respect, as in any separate and independent government. Whatever changes now exist in this respect must be sought for in the constitution and laws of the United States. *Warren Manufacturing Company v. Etna Insurance Company*, § 1116-20.

§ 1087. Under the constitutional provision with reference to the faith and credit to be given in each state to judgments of other states, and the act of congress of 1790 passed in execution of the power given to congress by this provision, whatever the diversity of opinion in the courts of the different states, a judgment of a state is to have the same credit, validity and effect in every other court of the United States as it has in the state where it is pronounced; and whatever plea would be good to a suit thereon in such state, and none other, can be pleaded in any other court in the United States. *Ibid.*

§ 1088. If a judgment of another state upon which suit is brought has no binding effect or operation, and that appears upon the face of the record, the plea of *nil debet* may be a good plea. It is the general issue, denying the whole cause of action, and leaves the question of jurisdiction open to inquiry. *Ibid.*

§ 1089. Under the constitution and act of congress, when suit is brought upon the judgment of another state, the question of jurisdiction remains open as at common law, and it may be shown by proper evidence that the court rendering the judgment had no jurisdiction; and the pleadings may be so shaped as to admit such evidence. *Ibid.*

§ 1090. Where a question, even a question of jurisdiction, has been once litigated between two parties by a court of general jurisdiction, it is to be treated as *res adjudicata* between the same parties in every other but an appellate forum. And where in a litigation between parties in such a court the question of the jurisdiction over the parties must have been considered, another court will presume that the court *a quo* did consider it, and will treat that question as *res adjudicata*. *Moch v. Virginia Fire and Marine Ins. Co.*, §§ 1148-55.

§ 1091. In a suit upon a judgment of a court of another state, although the domestic court may look into the jurisdiction of the foreign court both as to parties and subject matter, yet the parties are bound by the principle of *res adjudicata* when they come into the domestic court. And where the question of the jurisdiction of the foreign court over the parties has been contested and decided by it, the question is *res adjudicata* and cannot be raised in the domestic court in the action on the judgment. It was so held in a suit in Virginia upon a judgment rendered in Louisiana against a corporation not chartered in that state, upon service of process upon an agent doing business there, and the validity of such a service to give jurisdiction had been affirmed in the Louisiana court upon an exception raising the question. *Ibid.*

§ 1092. In an action upon a judgment of another state a plea of fraud in procuring that judgment is not, under the constitutional provision with reference to judgments of sister states, and the act of congress made in pursuance thereof, a legal answer to the declaration. *Christmas v. Russell*, §§ 1221-25.

§ 1093. Under the constitutional provision requiring full faith and credit to be given in each state to the records and judgments of every other state, and under the act of congress passed in pursuance thereof, declaring that the record when duly authenticated shall have in every other court of the United States the same faith and credit as it has in the state court from which it was taken, a state statute that judgments recovered in other states against citizens of such state shall not be enforced in the tribunals of that state, if the cause of action which was the foundation of the judgment would have been barred in her tribunals by her statute of limitations, is unconstitutional and void. *Ibid.*

§ 1094. The statute of limitations of Georgia may be pleaded in an action in that state in the United States circuit court founded on a judgment rendered in South Carolina. This statute declares "that actions of debt on judgments obtained in courts other than the courts of this state must be brought within five years after the judgment is obtained." *McElmoyle v. Cohen*, §§ 1128-30.

§ 1095. The effect intended to be given by the first section of the fourth article of the constitution to judgments in states other than where rendered is that they shall be conclusive only as regards the merits; and when suits are brought upon them they must be brought within the period prescribed by the local law. *Ibid.*

§ 1096. In the payment of debts of a testator or intestate in Georgia the judgment of another state cannot be put upon the footing of a judgment of that state, and can only rank for that purpose as a simple contract debt. *Ibid.*

§ 1097. The jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution, and the law of 1790, passed to carry that provision into effect. And evidence may be admitted to contradict the record as to the jurisdictional facts stated therein, notwithstanding such facts are stated to have been passed upon by the court. Thus, where a citizen of New York sued a sheriff of New Jersey for having seized the sloop of plaintiff for alleged violation of the law of New Jersey forbidding non-residents from taking oysters within her waters, it was held that the plaintiff might show that the justices before whom the vessel was brought and the cause heard were not the justices of the county where the seizure was made, as the law required, and that, therefore, such justices acted without jurisdiction, notwithstanding that this was an express contradiction of the record. *Thompson v. Whitman*, §§ 1131-33.

§ 1098. The faith and credit to be given to the judicial proceedings of a sister state is a question upon which an appeal lies from the supreme court of a state to the supreme court of the United States, where the faith and credit claimed for such judicial proceeding is denied by such court. *Green v. Van Buskirk*, §§ 1134-36.

§ 1099. In order to give due force and effect to a judgment, it is often necessary to show by evidence outside of the record the predicament of the property on which it operated. *Ibid.*

§ 1100. The record of a judgment authenticated according to the act of congress must be given the same faith and credit in every other state as it has in the state from which it is taken. *Ibid.*

§ 1101. A citizen of New York owning goods and chattels in Illinois made a mortgage of them in New York, and a few days afterwards, and before the mortgage was recorded in Illinois or the property was delivered, it was attached in Illinois on the ground of his non-residence. The laws of Illinois declare a chattel mortgage void as to third persons unless recorded or the property is delivered. The mortgagee sued the attaching creditor in New York for conversion of the property. It was held that as the attachment would be a justification of the defendant in Illinois it must, under the constitution and act of congress, be a protection to him in New York, notwithstanding the fiction that transfers of personal property are governed by the law of the owner's domicile. *Ibid.*

§ 1102. Although the return of the marshal in a suit instituted by summons, that he served the writ upon the defendant, without stating that he served it within the district, is sufficient to show jurisdiction, yet in an action upon a judgment rendered against a non-resident upon such a return, the defendant may show that he was never served with process and that the court never acquired jurisdiction of his person. *Knowles v. Gaslight & Coke Co.*, §§ 1137-38.

§ 1103. In a suit upon a judgment of another state, the defendant may contradict the record to the extent of showing that in point of fact the court rendering the judgment did not have jurisdiction of his person. But if it appears upon the face of the record that the court had jurisdiction, extrinsic evidence to contradict it is not admissible under a plea of *nul tiel record*. And although the defendant was not a resident of the state in which the judgment was rendered, and the service was by publication only, if the record shows an appearance for him by an attorney of the court, it shows jurisdiction; and want of authority of the attorney to appear cannot be shown under a plea of *nul tiel record*. *Hill v. Mendenhall*, §§ 1139-40.

§ 1104. To sustain a judgment there must be jurisdiction of the person as well as of the subject-matter; and to give jurisdiction of the person, due notice of suit or service of process must be shown, except in cases of proceedings under the statute process of foreign attachment, which is in the nature of a proceeding *in rem*, and subjects the goods attached to the judgment when recovered. But in such case if the goods attached are not sufficient to satisfy the judgment, no suit can be sustained upon the judgment for the deficiency, because the defendant is not personally amenable to the jurisdiction of the court rendering the judgment. *Warren Manufacturing Company v. Etna Insurance Company*, §§ 1116-20.

§ 1105. A judgment either strictly foreign, or coming within the operation of the constitution and laws of the United States, obtained without notice to the defendant or his appearing in the action, can have no validity or binding effect and operation. *Ibid.*

§ 1106. Subject to the qualification that judgments are open to inquiry as to the jurisdiction of the court where they were given and as to notice to the defendant, the judgment of a state court not reversed by a superior court, nor set aside by a direct proceeding in chancery, is conclusive in the courts of all other states where the subject-matter in controversy is the same. *Burt v. Delano*, §§ 1141-42.

§ 1107. Personal judgments are without any validity if rendered by a state court in an action upon a money demand against a non-resident of the state, upon whom no personal service of process was made within the state, unless he appeared and answered to the action; nor will such judgment affect his property beyond what he possessed in the state where the suit was brought. *Ibid.*

§ 1108. In a suit against a partnership, if one of the partners is not within the jurisdiction of the court and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction, even though by the *lex loci* a service on the partner resident within the jurisdiction is sufficient to authorize a judgment against all the partners. *Ibid.*

§ 1109. The laws of California provide that "when the action is against two or more defendants, jointly or severally liable in a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants." A citizen of California brought a suit in that state against copartners who lived in Massachusetts. Service was made upon only one of the defendants, he being transiently within the state at the time. A judgment was obtained which, by its terms, was to bind the partnership property of all of the defendants in the action, but if there was no partnership property, or if there was not sufficient to satisfy the judgment, the judgment or any deficiency therein was to be satisfied out of the individual property of the defendant who was served. In an action upon this judgment in the state of Massachusetts

against the defendant who was served in California, it was held that the judgment was good as against him though void as against the others, and that the action could be maintained. *Ibid.*

§ 1110. The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance. The rule is the same whether the defendant be a person or a corporation, except that in case of a corporation the process must of necessity be served upon its agents. *St. Clair v. Cox*, §§ 1143-47.

§ 1111. In the absence of a statute upon the subject, a corporation cannot be sued for the recovery of a personal demand outside of the state where it is chartered, except perhaps where it sends its agents to reside and transact its business in other states. The statutes of Michigan expressly authorize suits against foreign corporations doing business within the state, by service of process upon an "agent of such corporation within this state." This is construed as not authorizing such a suit unless the agent resides and is engaged in the business of the corporation within the state. And where a service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record that the corporation was engaged in business in the state. This fact so appearing, a certificate of service by the proper officer on a person who is its agent there, would be *prima facie* evidence that the agent represented the company in the business. It is then open, when the record is offered in evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose. But where the record nowhere shows that the foreign corporation was engaged in business within the state, a personal judgment is without jurisdiction, and the record is properly excluded when offered in evidence in a court of the United States. *Ibid.*

§ 1112. A foreign corporation may be sued in any state where it does business by its local agents, and, independently of any statute authorizing such service, service of process upon its agents within the state will give the court jurisdiction to render a valid judgment against it. And where a statute of the state provides that agents of foreign corporations shall be appointed and empowered respecting process before engaging in business within the state, service upon such an agent is sufficient to give the court jurisdiction to render a valid judgment, since the agent must be presumed to have been so empowered, and the defendant will not be heard to deny that it has in this respect complied with the statute. *Moch v. Virginia Fire & Marine Ins. Co.*, §§ 1148-55.

§ 1113. The service of process upon a resident agent of a non-resident insurance company defendant, whose powers do not embrace any authority to accept or acknowledge such service, or to appear and answer to any suit against the company, will not, in the absence of any statute authorizing such service, give the court jurisdiction so as to sustain a judgment. Nor will a service upon the president of the company outside of the state have any effect. *Warren Manufacturing Company v. Etna Insurance Company*, §§ 1116-20.

§ 1114. In a suit against a non-resident insurance company a service of process upon a resident agent of the company, whose powers do not include any authority to accept or acknowledge such service or to appear and answer to the suit, cannot be made good so as to sustain a judgment by a subsequent statute authorizing such a service. *Ibid.*

§ 1115. A statute of New York, in suits against joint debtors, authorizes a judgment against all if one is brought into court on process, but directs that no execution shall issue against the body or sole property of any person not brought into court. The courts of New York hold that such a judgment is valid and binding on an absent defendant as *prima facie* evidence of a debt, reserving him the right to enter again into the merits and show that he ought not to have been charged. But neither this statute nor a judgment founded on it binds a citizen of another state not served with process, although he is sued as a joint debtor with one duly brought into court. *D'Arcy v. Ketchum*, §§ 1156-57.

[NOTES.—See §§ 1158-1208.]

#### WARREN MANUFACTURING COMPANY v. ETNA INSURANCE COMPANY.

(Circuit Court for Connecticut: 2 Paine, 501-517.)

Opinion by THOMPSON, J.

STATEMENT OF FACTS.—This is an action of debt brought by the Warren Manufacturing Company, a body corporate, duly incorporated by a law of the



state of Maryland, located and doing business in Baltimore, and all the stock holders residents and citizens of the state of Maryland, against the Etna Insurance Company, a body corporate, duly incorporated by a law of the state of Connecticut, doing business in Hartford, in the state of Connecticut, the stockholders residing in and being citizens of the state of Connecticut; and the action is founded upon a judgment recovered in the county court of the sixth judicial district of the state of Maryland, on the 1st day of January, in the year 1836, for the sum of \$20,000. The defense set up in the case is embraced under four pleas:

1. *Nil debet*. 2. *Nul tiel record*. 3 and 4. Special pleas, stating in substance that the defendants at the time of the commencement of the suit were, and ever since have continued to be, inhabitants of the state of Connecticut, located, established and resident at Hartford, and were not, during said time, or at any other time, inhabitants of, or located, established or resident in, the state of Maryland, or within the jurisdiction of the said state or the laws thereof, or any of the courts thereof; and that the defendants were never served with any process in said suit, nor had any notice thereof, and never answered thereto or appeared or defended therein, nor in anywise authorized any other person in their behalf to appear and answer, and defend the same; that they were incorporated by the legislature of the state of Connecticut, and were never in any other wise incorporated than by the legislature of Connecticut.

The plaintiffs demur to the plea of *nil debet*, and take issue upon the plea of *nul tiel record*; and to the third and fourth pleas, the plaintiffs reply, setting out the incorporation of the defendants; and that, from the time of their incorporation up to the time of the commencement of the suit in the Maryland county court, they had an agent residing in Baltimore invested with powers to receive proposals for insurance against loss by fire, by policies signed by the president of said company and attested by their secretary and countersigned by their agent in Baltimore; and that, by virtue of said authority, the policy of insurance upon which the Maryland judgment was obtained was duly effected, and from time to time renewed, and the premium paid to the said agent, and by him paid over to the defendants. And the plaintiffs, in their replication, further allege and set out an act of the legislature of Maryland, passed on the 7th day of March, in the year 1835; by which it is declared that any insurance company not incorporated by the state of Maryland which shall effect, or shall have effected, insurance upon property within that state, and shall transact business within that state, shall be deemed to hold and exercise franchises within the state; and that every such corporation which shall hold and exercise, or which shall have held and exercised, franchises within the state, shall be liable to be sued within the state, in the courts of the state, upon contracts of insurance on property within the state, or on any dealings or transactions within the state; and that when any suit shall be instituted against any such insurance company, service of the writ issued in such cause, upon the president or any directors of such company, or upon any agent of such company, shall be deemed sufficient service, and that judgment may be thereupon rendered by default if such company shall fail to appear; and that if any such company, after any liability shall occur or shall have occurred, withdraw its agent from the state, or shall revoke the authority of the agent and shall not appoint another, and no president or directors of the company can be found within the state upon whom to serve any writ or process, that

service thereof upon the person last the agent of the company shall be deemed sufficient service, with a proviso that where such service shall be made upon an agent after his authority shall be revoked, before judgment by default shall be rendered, proof shall be made in the mode pointed out in the act, that a copy of such writ or process has been delivered to the president or two directors of the company within the state where such company shall have been incorporated; and the replication then avers that the writ in the Maryland suit was duly served upon the said agent of the defendants as provided by the act aforesaid; and the replication further avers that, before rendering the said judgment, a copy of the writ or declaration was, at the town of Hartford, in the state of Connecticut, served upon Thomas K. Brace, president of the company, whereby notice of the said suit was given to the defendants.

To this replication the defendants rejoin, denying that they had any agent in the city of Baltimore vested with the powers set forth in the replication, and denying, also, that the writ in the Maryland suit was served upon such supposed agent, as required by the Maryland law, and that the court did not thereby become invested with jurisdiction in and over said suit, or authorized thereby to render the said supposed judgment, and denying that a copy of the said writ and declaration was served on Thomas K. Brace, or actual notice thereby, of the pendency of said suit, was given to the defendants, or full opportunity afforded them of defending therein; and this they pray may be inquired of by the jury.

The cause came on to argument upon the demurrer to the plea of *nil debet*, and upon the admission of certain facts in relation to the issues of fact made by the pleadings in the cause. From the transcript of the record in the Maryland judgment it appears that the suit was commenced on the 10th day of April, in the year 1835; and the declaration is upon a policy of insurance against fire, bearing date the 16th day of October, in the year 1830, and renewed from time to time, according to the provisions in the policy, and continued until the 16th of October, 1834; and the loss is alleged to have occurred on the 24th day of January in 1834; and from the said record, and the return of the sheriff of Baltimore county, it appears that the writ was served on William Hope, agent of the Etna Insurance Company, on the 11th day of April, 1835; and that a copy of the writ and declaration was served on Thomas K. Brace, president of the Etna Insurance Company, on the 15th day of April, in the year 1835; and the agency of William Hope, under the power of attorney, set out in the transcript of the record, is admitted, bearing date on the 18th day of March, 1833, giving him full powers to receive proposals for insurance against loss by fire, to act as surveyor of buildings, and insurance thereon to make, by policies signed by the president and attested by the secretary, and countersigned by the said William Hope. It is admitted that Thomas K. Brace was president of the company, and that service of the writ and declaration was made on him, and the other proceedings had, as set forth in the transcript of the record, and that the court of Maryland had jurisdiction of the subject-matter of the suit in which judgment was rendered. The law of Maryland is also admitted.

Under this state of the pleadings and the admitted facts in the case the cause must turn principally upon the effect and operation of the Maryland judgment, and the construction to be given to the law of that state regulating proceedings against foreign corporations doing business within the state.

Prior to the adoption of the confederation and the constitution of the United

States, the several states were considered entirely independent of each other; and the judgments recovered in their respective courts were foreign judgments in every respect, as in any separate and independent government; and whatever changes now exist in this respect must be sought for in the constitution and laws of the United States. The constitution declares that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every state, and though congress may prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, and the act of congress of 1790, passed in execution of this power, declares that judgments in the states shall have the same faith and credit given to them in every court within the United States as they have by law or usage in the courts of the states from whence the record shall be taken. There has been considerable diversity of opinion prevailing in the courts of the different states, with respect to the construction of the constitution and the act of congress upon this subject. Some holding that the act of congress relates only to the mode of authentication, and that the legal import and effect and obligation of judgments of another state is still open to be decided by the rules and principles of the common law. Others have held that the terms *faith and credit*, as used in the act of congress, mean the same thing as the term *effect*, and that this effect being the same in the state where they are used as in the state where the judgments are rendered, they are in all respects like domestic judgments, as to their conclusiveness against the party who is the subject of them.

§ 1116. *Rule as to faith and credit to be given to judgments of other states.*

But whatever diversity of opinion may have existed on this subject, the question in this court would seem to be settled by the cases of *Mills v. Duryee*, 7 Cranch, 481, and *Hampton v. McConnel*, 3 Wheat., 234, decided in the supreme court of the United States. The doctrine of those cases is that the judgment of a state is to have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none other, could be pleaded in any other court in the United States. In the case of *Mills v. Duryea*, it was held that *nil debet* was not a good plea to an action founded on a judgment of another state; and it has been supposed by some that this decision went the length of laying down the general doctrine that the plea of *nul tiel record* was the only proper plea to an action upon a state judgment. But such is not the conclusion to be drawn from that case, but only that *nil debet* was not a proper plea in that case, but *nul tiel record* should have been pleaded. "For," say the court, "beyond all doubt the judgment of the supreme court of New York was conclusive upon the parties in that state, for the defendant was arrested and gave bail in the suit;" and there can be no doubt that, where the judgment is conclusive, *nul tiel record* is the proper plea.

§ 1117. — *fraud and want of jurisdiction may be shown.*

But if the record is not conclusive, it is open to such plea as will let in the defense which the party has a right to set up; and it would be competent for the defendant to show that the judgment was obtained by fraud, or that the court in which the judgment was obtained had not jurisdiction of the cause. Such defense might, in some cases, be set up to a suit upon the judgment in a court of the state in which it was rendered. In the case of *Andrews v. Montgomery*, 19 John., 162, Spencer, Ch. J., observed that with the qualifications

that the party may show that the judgment was obtained by fraud, or that the state court had not jurisdiction of the person of the defendant, we are bound, by the authority of the case in the supreme court of the United States, to consider a judgment fairly obtained in another state as conclusive evidence of the matter adjudicated; and in the case of *Bissell v. Briggs*, 9 Mass., 462, Parsons, Ch. J., in considering the construction to be given to the constitution and law of the United States upon this subject, observes that judgments rendered in any other of the United States are not, when produced here as the foundation of actions, to be considered as foreign judgments, the merits of which are to be inquired into, as well as the jurisdiction of the court rendering them; neither are they domestic judgments, rendered in our own courts of record, because the jurisdiction of the court rendering them is put in issue, but not the merits of the judgment. That when a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry; and if it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment; and that if the court of any state should render judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts, if that judgment should be produced in any other state against the defendant, the jurisdiction of the court might be inquired into; and if a want of jurisdiction appeared, no credit would be given to the judgment; and the court must not only have jurisdiction of the cause but of the parties.

If the judgment has no binding effect or operation, and that appears upon the face of the record, the plea of *nil debet* may be a good plea. It is the general issue, denying the whole cause of action, and leaves the question of jurisdiction open to inquiry. But it is not important in the present case to decide whether the plea of *nil debet* is a good plea or not; for there can be no doubt that under the constitution and act of congress the question of jurisdiction remains open as at common law; and it may be shown by proper evidence that the court rendering the judgment had no jurisdiction; and the pleadings may be so shaped as to admit such evidence; and if *nil debet* is not a proper plea for that purpose, the want of jurisdiction may be pleaded specially.

In the case of *Shumway v. Stillman*, 4 Cowen, 292, it was decided by the supreme court of New York that in an action upon a state judgment it was competent for the defendant to show by a special plea that the court in which the judgment was rendered had no jurisdiction either of the subject-matter or of the person; and in the present case the defendants have pleaded specially the want of jurisdiction in the Maryland court which rendered the judgment; and from the record itself it appears that the process to bring the defendants before the court was served on their agent in the city of Baltimore, and a copy thereof delivered to the president of the company in the state of Connecticut; and unless such service of the process was sufficient to bring the party before the court, the judgment was obtained without any notice of the suit being given to the defendants.

§ 1118. *To give jurisdiction personal service must be shown. Exceptions.*

It is admitted in the present case that the Maryland court had jurisdiction of the subject-matter of the suit; but jurisdiction over the person was also necessary in order to sustain the judgment; and to give jurisdiction of the person, due notice of the suit or service of the process must be shown, or the judgment is a nullity, except in cases of proceedings under the statute process of foreign attachment, which is in the nature of a proceeding *in rem*, and

subjects the goods attached to the judgment when recovered. But in such case, if the goods attached are insufficient to satisfy the judgment, no suit can be sustained upon the judgment for the deficiency, because the defendant in such case is not personally amenable to the jurisdiction of the court rendering the judgment. The language of the courts on the subject of notice to the party in order to give any validity to the judgment is very strong.

In the case of *Thurbur v. Blackbourne*, 1 N. H., 243, the court say the common law never recognizes judicial proceedings as foreign judgments, unless rendered by a court of record, upon personal notice given to the defendant, or his appearance to the action. And in *Kilburn v. Woodworth*, 5 John., 37, the court refused to permit such a judgment to be given in evidence; and they say, to bind a person by a judgment, when he was never personally summoned or had notice of the suit, would be contrary to the first principles of justice; and numerous other cases might be cited to the same effect. 10 R., 70; 1 Conn., 45; 9 Mass., 462; Kirby, 119. It may, therefore, I think, be assumed as the settled doctrine of the law, that a judgment either strictly foreign, or coming within the operation of the constitution and laws of the United States, obtained without notice to the defendant, or his appearing in any manner to answer to the suit, can have no validity or binding effect and operation. And the inquiry then is, whether the Maryland judgment, upon which the present suit is founded, is a judgment of this description. It was admitted on the argument, that the service of a copy of the writ and declaration upon the president of the Etna Company in the state of Connecticut could have no legal effect; and the notice to the defendants must, therefore, depend upon the service of the process upon their agent in the city of Baltimore. And the effect and operation of such service must depend upon the Maryland law set up in the replication; for, independent of that law, this service was a mere nullity. The powers of the agent did not embrace any authority to accept or acknowledge such service, or to appear and answer to any suit instituted against the company in the state of Maryland. He was, therefore, in this respect, a mere stranger to the defendants, and the service of the process on him was no more binding or operative than if made upon any other person; and I think the Maryland law cannot be applied to the present case so as to give any validity to the service of the process on the agent. This law, in its application to the proceedings and judgment in question, is entirely retrospective; the law was passed in March, 1835. The loss for which the judgment was obtained happened in January, 1834, and the policy expired in October of the same year; and the Maryland suit was commenced in April, 1835. From these dates of the several transactions the law is in some measure obnoxious to the inference that it was passed to meet the very case. But this can form no objection to it if the case can be brought within it; and the abstract justice of the law as applicable to subsequent cases cannot be questioned. The defendants, as a body corporate, could have no right to establish themselves or transact business in the state of Maryland, otherwise than according to the provisions of the laws of that state.

§ 1119. *Constitutional privileges of citizens cannot be applied to corporations.*

The provision in the constitution of the United States, "That the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," cannot be applied to corporations; and the state of Maryland had a right to exclude the corporation from transacting business in that state. And if the defendants, after the passage of that law, had continued underwriting policies in that state, they would be presumed to do it upon the

terms and conditions of the act; and as to all causes of action thereafter arising would subject themselves to prosecution in the mode pointed out by the act. This law may be considered as a kind of *quasi* incorporation of insurance companies which have not been chartered by the state; and if such companies exercise franchises there, it is just and reasonable that they should subject themselves to prosecutions for losses in the courts of that state, and will be deemed to have assented to the mode provided by the act for instituting suits for such losses.

§ 1120. *Statutes ought not to be retrospective.*

But the law in question, although it purports upon its face to have a retrospective operation, cannot be considered as having such effect and operation. It is a sound general principle that no statute ought to have a retrospective effect. It is the general rule that a statute takes effect from its date, when no time is fixed; and it cannot, upon sound principles, be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute partakes in its character of the mischiefs of an *ex post facto* law, and when applied to contracts or property would be equally unjust and unsound in principle as *ex post facto* laws when applied to crimes and penalties. 1 Kent, Com., 426; 7 Wheat., 164; 7 John., 477; 1 Gal., 62. Judgment for the defendant.

CHRISTMAS v. RUSSELL.

(5 Wallace, 290-307. 1866.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Wilson, on the 11th day of November, 1857, recovered judgment in one of the county courts in the state of Kentucky, against the plaintiff in error, for the sum of \$5,634.13, which, on the 31st day of March, 1859, was affirmed in the court of appeals. Present record shows that the action in that case was *assumpsit*, and that it was founded upon a certain promissory note, signed by the defendant in that suit, and dated at Vicksburg, in the state of Mississippi, on the 10th day of March, 1840, and that it was payable at the Merchants' Bank in New Orleans, and was duly indorsed to the plaintiff by the payee. Process was duly served upon the defendant, and he appeared in the case and pleaded to the declaration. Several defenses were set up, but they were all finally overruled, and the verdict and judgment were for the plaintiff.

On the 4th day of June, 1854, the prevailing party in that suit instituted the present suit in the court below, which was an action of debt on that judgment as appears by the transcript. Defendant was duly served with process, and appeared and filed six pleas in answer to the action. Reference, however, need only be particularly made to the second and fourth, as they embody the material questions presented for decision. Substance and effect of the second plea were that the note, at the commencement of the suit in Kentucky, was barred by the statute of limitations of Mississippi, the defendant having been a domiciled citizen of that state when the cause of action accrued, and from that time to the commencement of the suit.

Fourth plea alleges that the judgment mentioned in the declaration was procured by the fraud of the plaintiff in that suit. Plaintiff demurred to these pleas, as well as to the fifth and sixth, and the court sustained the demurrers.

First plea was *nul tiel record*, but the finding of the court, under the issue joined, negatived the plea. The third plea was payment, to which the plaintiff replied, and the jury found in his favor.

II. 1. Resting upon his second and fourth pleas, the defendant sued out this writ of error, and now seeks to reverse the judgment, upon the ground that the demurrers to those pleas should have been overruled. Views of the defendant were, and still are, that the second plea is a valid defense to the action on the judgment, under the statute of Mississippi passed in February, 1857, and found in the code of that state which went into effect on the 1st day of November of that year. By that statute it was enacted that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred, by any act of limitation of this state, if such suit had been brought therein." Mississippi Code, 400.

Material facts are that the defendant, being a citizen and resident of Mississippi, made the note to the payee, who indorsed the same to the plaintiff, a citizen and resident of Kentucky. Such causes of action are barred by limitation, under the Mississippi statute, in six years after the cause of action accrues. Some time in 1853 the defendant went into Kentucky on a visit, and while there was sued on the note. He pleaded, among other pleas, the statute of limitations of Mississippi, and, on the first trial, a verdict was found in his favor; but the judgment was reversed on appeal, and at the second trial the verdict and judgment were for the plaintiff.

2. Undoubtedly the second plea in this case is sufficient in form, and it is a good answer to the action if the statute under which it was framed is a valid law. Plaintiff in error suggests that it should be considered as a statute of limitations; and, if it were possible to regard it in that light, there would be little or no difficulty in the case. Statutes of limitation operating prospectively do not impair vested rights or the obligation of contracts. Reasons of sound policy have led to the adoption of limitation laws, both by congress and the states, and, if not unreasonable in their terms, their validity cannot be questioned. Consequently, it was held by this court, in the case of *McElmoyle v. Cohen*, 13 Pet., 312 (§§ 1126-30, *infra*), that the statute of limitations of Georgia might be pleaded to an action in that state founded upon a judgment rendered in the state court of Carolina. Cases, however, may arise where the provisions of the statute on that subject may be so stringent and unreasonable as to amount to a denial of the right, and in that event a different rule would prevail, as it could no longer be said that the remedy only was affected by the new legislation. *Bronson v. Kinzie*, 1 How., 315 (Const., §§ 1650-55); *Angell on Limitations*, 18.

§ 1121. *Statute cutting off right of action on judgment rendered in another state, unconstitutional.*

3. But the provision under consideration is not a statute of limitations as known to the law or the decisions of the courts upon that subject. Limitation, as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law. *Bouvier's Dictionary*, title Limitation.

Looking at the terms of this provision, it is quite obvious that it contains no

element which can give it any such character. Plain effect of the provision is to deny the right of the judgment creditor to sue at all, under any circumstances, and wholly irrespective of any lapse of time whatever, whether longer or shorter. No day is given to such a creditor, but the prohibition is absolute that no action shall be maintained on any judgment or decree falling within the conditions set forth in the provision. Those conditions are addressed, not to the judgment, but to the cause of action which was the foundation of the judgment. Substantial import of the provision is that judgments recovered in other states against the citizens of Mississippi shall not be enforced in the tribunals of that state, if the cause of action which was the foundation of the judgment would have been barred in her tribunals by her statute of limitations.

Nothing can be plainer than the proposition is, that the judgment mentioned in the declaration was a valid judgment in the state where it was rendered. Jurisdiction of the case was undeniable, and the defendant being found in that jurisdiction, was duly served with process, and appeared and made full defense. Instead of being a statute of limitations in any sense known to the law, the provision, in legal effect, is but an attempt to give operation to the statute of limitations of that state in all the other states of the Union by denying the efficacy of any judgment recovered in another state against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law. Where the cause of action which led to the judgment was not barred by her statute of limitations, the judgment may be enforced; but if it would have been barred in her tribunals, under her statute, then the prohibition is absolute that no action shall be maintained on the judgment.

4. Article 4, section 1, of the constitution provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof." Congress has exercised that power, and in effect provided that the judicial records in one state shall be proved in the tribunals of another, by the attestation of the clerk, under the seal of the court, with the certificate of the judge that the attestation is in due form. 2. That such records so authenticated "shall have such faith and credit given to them in every other court in the United States as they have by law or usage in the courts of the state from whence the said records were or shall be taken." 1 Stat. at Large, 122; *D'Arcy v. Ketchum*, 11 How., 175 (§§ 1156-57, *infra*).

When the question of the construction of that act of congress was first presented to this court it was argued that the act provided only for the admission of such records as evidence; that it did not declare their effect; but the court refused to adopt the proposition, and held, as the act expressly declares, that the record, when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the state court from whence it was taken. *Mills v. Duryee*, 7 Cranch, 483.

Repeated decisions made since that time have affirmed the same rule, which is applicable in all similar cases where it appears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defense. *Hampton v. McConnel*, 3 Wheat., 332; *Nations v. Johnson*, 24 How., 203 (APPEALS, §§ 1670-74); *D'Arcy v. Ketchum*, 11 id., 165 (§§ 1156-57, *infra*); *Webster v. Reid*, id., 460. Where the jurisdiction has



attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits. *Bissell v. Briggs*, 9 Mass., 462; *United States Bank v. Merchants' Bank*, 7 Gill, 430. Speaking of the before mentioned act of congress, Judge Story says it has been settled, upon solemn argument, that that enactment does declare the effect of the records as evidence when duly authenticated. . . . "If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere" in the courts of the United States. 2 Story on Constitution (3d ed.), § 1313.

5. Applying these rules to the present case, it is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals. Such was the decision of the highest court in the state, and it was undoubtedly correct; and if so, it is not competent for any other state to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the state courts from which it was taken.

§ 1122. *General and special demurrers.*

II. 1. Second error assigned is that the court erred in sustaining the demurrer to the fourth plea, which alleged that the judgment was procured by the fraud of the plaintiff. First proposition assumed by the present defendant is that the plea is defective and insufficient, because it does not set forth the particular acts of the plaintiff which are the subject of complaint. But the substance of the plea, if allowable at all, is well enough under a general demurrer, as in this case. Whether general or special, a demurrer admits all such matters of fact as are sufficiently pleaded, and to that extent it is a direct admission that the facts alleged are true. *Nowlan v. Geddes*, 1 East, 634; *Grundy v. Feltham*, 1 Term, 334; *Stephen on Pleading*, 142.

Where the objection is to matter of substance, a general demurrer is sufficient, but where it is to matter of form only, a special demurrer is necessary. Demurrers, says Chitty, are either general or special; general when no particular cause is alleged, special when the particular imperfection is pointed out and insisted upon as the ground of demurrer. The former will suffice when the pleading is defective in substance, and the latter is requisite where the objection is only to the form of the pleading. 1 Chitty's Pleading, 663; *Snyder v. Croy*, 2 Johns., 428. Obviously the objection is to the form of the plea, and is not well taken by a general demurrer.

§ 1123. *Conclusiveness of judgments of other states.*

2. But the second objection is evidently to the substance of the plea, and therefore is properly before the court for decision. Substance of the second objection of the present defendant to the fourth plea is, that inasmuch as the judgment is conclusive between the parties in the state where it was rendered, it is equally so in every other court in the United States, and consequently that the plea of fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of *Mills v. Duryee* was whether *nil debet* was a good plea to an action founded on a judgment of another state. Much consideration was given to the case, and the decision was that the record of a state court, duly authenticated under the act of congress, must have in every other court of the United States such faith and credit as it had in the

state court from whence it was taken, and that *nil debet* was not a good plea to such an action.

Congress, say the court, have declared the effect of the record by declaring what faith and credit shall be given to it. Adopting the language of the court in that case, we say that the defendant had full notice of the suit, and it is beyond all doubt that the judgment of the court was conclusive upon the parties in that state. "It must, therefore, be conclusive here also." Unless the merits are open to exception and trial between the parties, it is difficult to see how the plea of fraud can be admitted as an answer to the action.

§ 1124. *The conclusiveness of foreign judgments.*

3. Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial or by bill in chancery. Third persons *only*, says Saunders, could set up the defense of fraud or collusion, and not the parties to the record whose only relief was in equity, except in the case of a judgment obtained on a *cognovit* or a warranty of attorney. 2 Saunders on Pleading and Evidence, part 1, p. 63.

Common law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules a foreign judgment was *prima facie* evidence of the debt, and it was open to examination not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained. Recent decisions, however, in the parent country hold that even a foreign judgment is so far conclusive upon a defendant that he is prevented from alleging that the promises upon which it is founded were never made or were obtained by fraud of the plaintiff. *Bank of Australasia v. Nias*, 4 Eng. L. & Eq., 252.

4. Cases may be found in which it is held that the judgments of a state court, when introduced as evidence in the tribunals of another state, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another state are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the constitution and laws of congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from whence" they were taken; nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments. *D'Arcy v. Ketchum*, 11 How., 165 (§§ 1156-57, *infra*); *Webster v. Reid*, *id.*, 437.

Subject to those qualifications, the judgment of a state court is conclusive in the courts of all the other states wherever the same matter is brought in controversy. Established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, *mesne* or *final*, as the case may be, to

execute the judgment. *Voorhees v. United States Bank*, 10 Pet., 449; *Huff v. Hutchingson*, 14 How., 588.

§ 1125. *Cases examined.*

5. Exactly the same point was decided in the case of *Benton v. Burgot*, 10 Serg. & R., 240, which, in all respects, was substantially like the present case. The action was debt on judgment recovered in a court of another state, and the defendant appeared and pleaded *nil debet*, and that the judgment was obtained by fraud, imposition and mistake, and without consideration. Plaintiff demurred to those pleas, and the court of original jurisdiction gave judgment for the defendant. Whereupon the plaintiff brought error, and the supreme court of the state, after full argument, reversed the judgment and directed judgment for the plaintiff. Domestic judgments, say the supreme court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside. *Granger v. Clark*, 22 Me., 130. Settled rule, also, in the supreme court of Ohio, is that the judgment of another state, rendered in a case in which the court had jurisdiction, has all the force in that state of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. Express decision of the court is, that such a judgment can only be impeached by a direct proceeding in chancery. *Anderson v. Anderson*, 8 Ohio, 108.

Similar decisions have been made in the supreme court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered. *B. & W. Railroad v. Sparhawk*, 1 Allen, 448; *Homer v. Fish*, 1 Pick., 435. Whole current of decisions upon the subject in that state seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defense were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery. *McRae v. Mattoon*, 13 Pick., 57. State judgments, in courts of competent jurisdiction, are also held by the supreme court of Vermont to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show that they were collusive or fraudulent; but they bind parties and privies. *Atkinsons v. Allen*, 12 Vt., 624.

Redfield, Ch. J., said in the case of *Hammond v. Wilder*, 23 Vt., 346, that there was no case in which the judgment of a court of record of general jurisdiction had been held void, unless for a defect of jurisdiction. Less uniformity exists in the reported decisions upon the subject in the courts of New York, but all those of recent date are to the same effect. Take, for example, the case of *Embury v. Conner*, 3 Comst., 522, and it is clear that the same doctrine is acknowledged and enforced. Indeed, the court, in effect, say that the rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. *Dobson v. Pearce*, 2 Kern., 165. Same rule prevails in the courts of New Hampshire, Rhode Island and Connecticut, and in most of the other states. *Hollister v. Abbott*, 11 Foster, 448; *Rathbone v. Terry*, 1 R. I., 77; *Topp v. The Bank*, 2 Swan, 188; *Wall v. Wall*, 28 Miss., 413.

For these reasons our conclusion is, that the fourth plea of the defendant is bad upon general demurrer, and that there is no error in the record. The judgment of the circuit court is, therefore, affirmed with costs.

MELMOYLE v. COHEN.

(13 Peters, 312-330. 1839.)

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—This cause has been brought to this court upon a certificate of division of opinion between the judges of the sixth circuit court, upon the following points: 1. Whether the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina? 2. Whether, in the administration of assets in Georgia, a judgment rendered in South Carolina upon a promissory note against the intestate, when in life, should be paid in preference to simple contract debts?

§ 1126. *A judgment of a sister state is distinguishable from a foreign judgment only in that it is a record, conclusive upon the merits, and entitled to full faith and credit.*

Upon neither of these points does the court entertain a doubt. Upon the first of them, we observe, though a judgment obtained in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this: that by the first section of the fourth article of the constitution, and by the act of May 26, 1790, section 1 (1 Stats. at Large, 122), the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given when authenticated as the act of congress has prescribed. It must be obvious, when the constitution declares that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and provides that congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state.

§ 1127. — *but to give it the force of a judgment in another state it must become a judgment of the state. It cannot be enforced by execution beyond the borders of the state.*

The authenticity of a judgment and its effect depend upon the law made in pursuance of the constitution; the faith and credit due to it as the judicial proceeding of a state is given by the constitution, independently of all legislation. By the law of the 26th of May, 1790, the judgment is made a debt of record, not examinable upon its merits, but it does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a state court cannot be enforced out of the state by an execution issued within it. This concession admits the conclusion, that, under the first section of the fourth article of the

constitution, judgments out of the state in which they are rendered are only evidence in a sister state that the subject-matter of the suit has become a debt of record, which cannot be avoided but by the plea of *nul tiel record*. But we need not doubt what the framers of the constitution intended to accomplish by that section, if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect, *rei judicata*, throughout Europe, in England, and in these states, when our first confederation was formed. On the continent it was then, and continues to be, a vexed question, determined by each nation according to its estimate of the weight of authority to which different civilians and writers upon the laws of nations are entitled. In England, it was an open question, having on both sides her eminent equity, common law and ecclesiastical jurists. It may still be considered, in England, a controverted question, so far as jurists and elementary writers on the common law are concerned; though the adjudications of the English courts have now established the rule to be, that foreign judgments are *prima facie* evidence of the right and matter they purport to decide.

In these states, when colonies, the same uncertainty existed. When our Revolution began, and independence was declared, and the confederation was being formed, it was seen by the wise men of that day that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each state, in all the states, would produce such intimate relations between the states and persons that the former would no longer be foreign to each other in the sense that they had been as dependent provinces; and that, for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states. Accordingly, in the articles of confederation, there was this clause: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." Now, though this does not declare what was to be the effect of a judgment obtained in one state in another state, what was meant by the clause may be considered as conclusively determined almost by contemporaneous exposition. For when the present constitution was formed, we find the same clause introduced into it with but a slight variation, making it more comprehensive; and adding: "Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof;" thus providing in the constitution for the deficiency which experience had shown to be in the provision of the confederation; as the congress under it could not legislate upon what should be the effect of a judgment obtained in one state in the other states. Whatever difference of opinion there may have been as to the interpretation of this article of the constitution in another respect, there has been none as to the power of congress under it to declare what shall be the effect of a judgment of a state court in another state of the Union. Here, again, we have contemporaneous legislative interpretation of the first section of the fourth article of the constitution; for by the act of 1790, May 26, it was declared: "That the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

§ 1128. *Rule as to conclusiveness of judgments of other states.*

What faith and credit, then, is given in the states to the judgments of their courts? They are record evidence of a debt, or judgments of record, to be

contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered. In other words, as has been said by a commentator upon the constitution: "If a judgment is conclusive in a state where it is pronounced, it is equally conclusive everywhere in the states of the Union. If re-examinable there, it is open to the same inquiries in every other state." Story's Com., 183. It is, therefore, put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim or subject-matter of the suit. When, therefore, this court said, in *Mills v. Duryee*, 7 Cranch, 481: "If it be a record conclusive between the parties, it cannot be denied; but by the plea of *null tiel record*," this language does not admit of the interpretation that a plea not denying the judgment, but which resists it upon the ground of a release, payment, or a presumption of payment from the lapse of time, whether such presumption be raised by the common-law prescription, or by a statute of limitation, may not be pleaded, any more than where this court, in *Hampton v. M'Connel*, 3 Wheat., 234, says: "The judgment of a state court should have the same credit, validity and effect in every other court of the United States which it had in the state court where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any court in the United States," is intended to exclude such defenses as have just been stated, or such as inquire into the jurisdiction of the court in which the judgment was given to pronounce it, as the right of the state itself to exercise authority over the persons or the subject-matter. It has well been said: "The constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state." 3 Story's Com., 183.

§ 1128a. *Limitations is a plea to the remedy, and the lex fori prevails. (a)*

Such being the faith, credit and effect to be given to a judgment of one state in another, by the constitution and the act of congress, the point under consideration will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy; and, consequently, that the *lex fori* must prevail. *Higgins v. Scott*, 2 Barn. & Ad., 413; 4 Cowen, 528, note 10; *id.*, 530; *Van Reimsdyk v. Kane*, 1 Gall., 371; *Le Roy v. Crowninshield*, 2 Mason, 151; *British Linen Com. v. Drummond*, 10 Barn. & Cres., 903; *De La Vega v. Vianna*, 1 Barn. & Ad., 284; *De Couche v. Savetier*, 3 Johns. Ch., 190; *Lincoln v. Battelle*, 6 Wend., 475; *Gulick v. Lodes*, 1 Green (N. J.), 68; 3 Burge's Com. on Col. and For. Laws, 883. The statute of Georgia is: "That actions of debt

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(a) The power of a state to fix a time beyond which an action shall be barred on the judgment of another state is not affected by the constitution of the United States and the act of congress declaring the faith and credit to be given to judgments of other states. The court, in this case, following the decisions of the supreme court of Ohio, the state in which it was sitting, decides that an action on a judgment of a sister state is an action of debt on a specialty, within the meaning of those terms as used in the Ohio statute of limitations, though the supreme court of Ohio holds that an action on a domestic judgment is not such an action. *Randolph v. King*, \* 2 Bond, 104.

on judgments obtained in courts other than the courts of this state must be brought within five years after the judgment obtained."

§ 1129. *To pass laws of limitations is a right and power of sovereignty.*

It would be strange if, in the now well-understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts.

Prescription is a thing of policy growing out of the experience of its necessity; and the time after which suits or actions shall be barred has been from a remote antiquity fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states under our system exercise this right in virtue of their sovereignty? or is it to be conceded to them in every other particular than that of barring the remedy upon judgments of other states by the lapse of time? The states use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not then limit the time for remedies upon the judgments of other states and alter the common law by statute, fixing a less or larger time for such presumption, and altogether barring suits upon such judgments if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other states shall be put upon a better footing in regard to a state's right to legislate in this particular than the judgment creditors of the state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's restraining the remedy upon the judgment of another state, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years? In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the constitution from which it can be even plausibly inferred that the states may not legislate upon the remedy in suits upon the judgments of other states exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our constitution to judgments is that they are conclusive only as regards the merits, the common law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred.

Counsel have relied to establish a contrary doctrine upon *Marlow v. Naylor*, Hill (S. C.), 439. But that case was obviously decided upon a misconception of the learned judges of the decision of this court in the case of *Mills v. Duryee*, 7 Cranch, 481. It is therefore our opinion that the statute of limitations of Georgia can be pleaded to an action in that state founded upon a judgment rendered in the state of South Carolina.

§ 1130. *Under the Georgia administration law, a judgment of a sister state took no precedence over simple contract debts, in the order of payment.*

The second question upon which the judges were divided in this case is whether a judgment, rendered in South Carolina upon a promissory note,

against the intestate when in life, should be paid in preference to simple contract debts? The law of Georgia provides that all debts of an equal degree shall be discharged in equal proportions as far as the assets of an intestate will extend, and that no preference shall be given amongst creditors in equal degree. Prince's Laws of Georgia, 152, § 8. And the order prescribed for the payment of debts of any testator or intestate by executors or administrators is "debts due by the deceased as executor, administrator or guardian; funeral and other expenses of the last sickness; charges of probate and will or of the letters of administration; next, debts due to the public; next, judgments, mortgages and executions, the eldest first; next, rent; then, bonds or other obligations; and lastly, debts due on open account; but no preference whatever shall be given to creditors in equal degree where there is deficiency in assets, except in cases of judgments, mortgages that shall be recorded, from the time of recording, and executions lodged in the sheriff's office, the eldest of which shall be first paid; or in those cases where a creditor may have a lien on any part of the estate." We first remark upon this question that it was decided some years since (as is reported to us by the present district judge) in the circuit court of the United States for the district of Georgia, the question being "whether judgments obtained in other states take precedence of simple contract debts," that in the administration of insolvent estates in Georgia such judgments take no precedence. Case of *Ten Eyck v. Ten Eyck*. We believe from inquiry, for we have no published decision in point from the courts of Georgia, that the judges of her superior courts hold the same opinion. In *Cameron v. Administrators of Wurtz*, 4 McCord, 278, it is decided that in marshaling the assets of an insolvent estate, a judgment recovered in another state only ranks as a simple contract. The decision is correctly placed upon the footing that the first section of the fourth article of the constitution has effected no change in the nature of a judgment. "It only provides that as matter of evidence it shall be entitled to full faith and credit."

But if the decisions in the cases of *Ten Eyck v. Ten Eyck* and *Cameron v. Wurtz* had not been as they are, and the point was now before us as an original question, we would come to the same conclusion. The legislature of Georgia does not certainly, in terms, put judgments of other states in the payment of decedent's debts upon the footing of judgments of her own courts. The term judgments is used, and no preference can be given to creditors in equal degree. If, however, equality in the degree of judgment creditorship is qualified by seniority, and if, of executions lodged in the sheriff's office, the eldest is to be the first satisfied, the law of Georgia gives the order in which judgments shall be paid. That order depends upon date, execution, and the execution having been lodged in the sheriff's office. In case of conflict, then, between judgments or executions, it is to be decided by record evidence to be obtained from the courts in the state; and, so far as a right of seniority can be given by the execution being lodged in the sheriff's office, the judgment of another state can never have this privilege. It can have no right to an execution in Georgia; and any execution issued upon it is in the state in which it was rendered. No one will contend that it could be placed with the sheriff to be enforced or to be put in competition with those issued upon domestic judgments. Here, then, is a case in which the judgment of another state would be excluded by the terms of the law, which we think indicates the intention of the legislature not to place such a judgment upon the footing of domestic judgments in the administration of assets. But a more conclusive reason against



any such extension occurs to us. By the law of Georgia, all the property of the defendant is bound from the signing of the first judgment; all judgments obtained at the same term of the court bearing equal date, if they are entered and signed in the clerk's office at any time within four days after the adjournment of the court. Prince's Dig., 211. If, then, the judgment of another state is to be brought in upon the footing of a domestic judgment in the administration of the assets of testators and intestates, then this consequence may ensue: that a judgment of another state, having no lien upon property, may take preference by the death of a defendant over domestic judgments, having the first lien during his life, because the law says the eldest judgment must be first satisfied. Such a right and exclusion of right could never have been intended by the legislature of Georgia to be conferred by the death of an individual. It is not necessary to pursue this inquiry further. We therefore think, in the payment of debts of a testator or intestate in Georgia, that the judgment of another state, whatever may be the subject-matter of the suit, cannot be put upon the footing of judgments rendered in that state, and that it can only rank for that purpose as a simple contract debt.

As to the wish intimated by counsel in the conclusion of his reply, that this court would express its opinion whether the statute limiting the time within which suits are to be brought upon the judgments of another state is in force, we cannot comply with it, as it is a question not comprehended in the division of opinion certified to this court.

THOMPSON v. WHITMAN.

(18 Wallace, 457-471. 1873.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Whitman, a citizen of New York, sued Thompson, a sheriff of New Jersey, for having seized the sloop of plaintiff for alleged violation of the oyster law of New Jersey, which prohibits non-residents from taking oysters, etc., in the waters of New Jersey, under penalty of forfeiture of their vessels. The pleadings made the issue whether the seizure was made in the waters of New Jersey at all, and if so, whether within the county alleged in the special plea of the defendant. The defendant produced the record of the proceedings of the two justices, and relied on that record as conclusive under the fourth article, section 1, of the constitution of the United States, and an act of congress (1 Stat. at Large, 122). There was judgment for the plaintiff.

Opinion by MR. JUSTICE BRADLEY.

The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated with due particularity sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another state? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true that the court charged generally that the record was only *prima facie* evidence of the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specially thereon, the charge may be regarded as having reference to the question of jurisdiction. And if upon that question it was correct, no injury was done to the defendant.

Without that provision of the constitution of the United States which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and the act of congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth county jurisdiction, whatever might be its effect in New Jersey. In any other state it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. "Upon principle," says Chief Justice Marshall, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." *Rose v. Himely*, 4 Cranch, 269. To the same effect see *Story on the Constitution*, ch. 29; 1 *Greenleaf on Evidence*, § 540.

§ 1131. *As to jurisdictional facts, the records of another state are not conclusive, either under the constitutional provision (art. IV, sec. 1), or the act of congress of 1790 (1 Stat. at Large, 122).*

The act of congress above referred to, which was passed 26th of May, 1790, after providing for the mode of authenticating the acts, records and judicial proceedings of the states, declares, "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state the same effect, in all respects, which they have in the state where they are rendered. And the language of this court in *Mills v. Duryee*, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each state the same conclusive effect, as records, in all the states as they had at home, and that *nil debet* could not be pleaded to an action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed.

Justice Story, who pronounced the judgment in *Mills v. Duryee*, in his *Commentary on the Constitution* (sec. 1313), after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one state in every other state, adds: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given,

to pronounce it, or the right of the state itself to exercise authority over the person or the subject-matter. The constitution did not mean to confer [upon the states] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." In the Commentary on the Conflict of Laws, sec. 609, substantially the same remarks are repeated, with this addition: "It" (the constitution) "did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them, as evidence. No execution can i sue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Many cases in the state courts are referred to by Justice Story in support of this view. Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his commentaries. Vol. 1, p. 281; see, also, vol. 2, 95, note, and cases cited. "The doctrine in *Mills v. Duryee*," says he, "is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the *cause*, but of the *parties*, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another state, to be valid, must deny, by positive averments, every fact which would go to show that the court in another state had jurisdiction of the person or of the subject-matter."

In the case of *Hampton v. McConnel*, 3 Wheat., 234, this court reiterated the doctrine of *Mills v. Duryee*, that "the judgment of a state court should have the same credit, validity and effect in every other court of the United States which it had in the state court where it was pronounced; and that whatever pleas would be good to a suit therein in such state, and none others, could be pleaded in any court in the United States." But in the subsequent case of *McElmoyle v. Cohen*, 13 Pet., 312 (§§ 1126-30, *supra*), the court explained that neither in *Mills v. Duryee*, nor in *Hampton v. McConnel*, was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, etc.; or pleas denying the jurisdiction of the court in which the judgment was given; and quoted, with approbation, the remark of Justice Story, that "the constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state."

§ 1132. *The jurisdiction of a court to render a judgment may be assailed in another state by proof in contradiction of its record, even in a collateral proceeding.*

The case of *Landes v. Brant*, 10 How., 348, has been quoted to show that a judgment cannot be attacked in a collateral proceeding. There a judgment relied on by the defendant was rendered in the territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form, "And now at this day come the par-

ties aforesaid by their attorneys," etc. The court pertinently remarked (page 371) that the defendant may have left behind counsel to defend suits brought against him in his absence, but that if the recital was false and the judgment voidable for want of notice, it should have been set aside by *audita querela* or motion in the usual way, and could not be impeached collaterally. Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of *Shumway v. Stillman*, 6 Wend., 453; *Aldrich v. Kinney*, 4 Conn., 380; and *Price v. Ward*, 1 Dutch., 225. The remark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was, in effect, overruled by the subsequent cases of *D'Arcy v. Ketchum* and *Webster v. Reid*. *D'Arcy v. Ketchum*, 11 How., 165 (§§ 1156-57, *infra*), was an action in the circuit court of the United States for Louisiana, brought on a judgment rendered in New York under a local statute, against two defendants, only one of whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that state; that the constitutional provision and act of congress giving full faith, credit and effect to the judgments of each state in every other state do not refer to judgments rendered by a court having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of retrying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding.

But this uncertainty and confusion related only to valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or (as might have been added) in proceedings *in rem*, where the court had jurisdiction of the *res*. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction. "The international law as it existed among the states in 1790," say the court (p. 176), "was that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force. Subject to this established principle, congress also legislated; and the question is, whether it was intended to overthrow this principle and to declare a new rule which would bind the citizens of one state to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the states where made."

In the subsequent case of *Webster v. Reid*, 11 How., 437, the plaintiff claimed by virtue of a sale made under judgments in behalf of one Johnson and one Brigham against "The Owners of Half-Breed lands lying in Lee county," Iowa Territory, in pursuance of a law of the territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication

as required by the act. This court held that, as there was no service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

In *Harris v. Hardeman*, 14 How., 334, which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by Mr. Justice Daniel at some length, and several cases in the state courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of *Borden v. Fitch*, 15 John., 141, and *Starbuck v. Murray*, 5 Wend., 156, and from the latter the following remarks were quoted with apparent approval: "But it is contended that if other matter may be pleaded by the defendant he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. . . . The plaintiffs, in effect, declare to the defendant,—the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle."

The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in *D'Arcy v. Ketchum*.

Thus, in *Christinas v. Russell*, 5 Wall., 290 (§§ 1121–25, *supra*), where the court decided that fraud in obtaining a judgment in another state is a good ground of defense to an action on the judgment, it was distinctly stated (p. 305), in the opinion, that such judgments are open to inquiry as to the jurisdiction of the court and notice to the defendant. And in a number of cases, in which was questioned the jurisdiction of a court, whether of the same or another state, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus, in *Elliott v. Peirsol*, 1 Pet., 328, 340 (Ev., §§ 2024–31), it was held that the circuit court of the United States for the district of Kentucky might question the jurisdiction of a county court of that state to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The same views were repeated in *The United States v. Arredondo*, 6 Pet., 691; *Voorhees v. Bank of the United States*, 10 id., 475; *Wilcox v. Jackson*, 13 Pet., 511; *Shriver v. Lynn*, 2 How., 59, 60; *Hickey v. Stewart*, 3 id., 762; and *Williamson v. Berry*, 8 id., 540. In the last case the authorities are reviewed, and the court say: "The jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the

former are relied upon and brought before the latter by a party claiming the benefit of such proceedings;" and "the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery or the municipal laws of states."

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the states, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extraterritorial force.

It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other states than have the courts of New Jersey. The subject was examined and the doctrine affirmed, after a careful review of the cases, in the case of *Moulin v. Insurance Co.*, 4 Zab., 222, and again in the same case in 1 Dutcher, 57, and in *Price v. Ward*, 1 Dutcher, 225, and as lately as November, 1870, in the case of *Mackay v. Gordon*, 34 N. J., 286. The judgment of Chief Justice Beasley in the last case is an able exposition of the law. It was a case similar to that of *D'Arcy v. Ketchum*, 11 How. 165 (§§ 1156-57, *infra*), being a judgment rendered in New York under the statutes of that state, before referred to, against two persons, one of whom was not served with process. "Every independent government," says the chief justice, "is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extraterritorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a state against a citizen of such state, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign state."

On the whole we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

This is decisive of the case, for, according to the findings of the jury, the

justices of Monmouth county could not have had any jurisdiction to condemn the sloop in question. It is true she was seized in the waters of New Jersey; but the express finding is, that the seizure was not made within the limits of the county of Monmouth, and that no claims were raked within the county on that day. The authority to make the seizure and to entertain cognizance thereof is given by the ninth section of the act, as follows:

"It shall be the duty of all sheriffs and constables, and may be lawful for any other person or persons, to seize and secure any such canoe, flat, scow, boat or other vessel as aforesaid, and immediately thereupon give information thereof to *two justices of the peace of the county where such seizure shall have been made*, who are hereby empowered and required to meet at such time and place as they shall appoint for the trial thereof, and hear and determine the same; and in case the same shall be condemned, it shall be sold by the order of and under the direction of the said justices, who, after deducting all legal costs and charges, shall pay one-half of the proceeds of said sale to the collector of the county in which such offense shall have been committed, and the other half to the person who shall have seized and prosecuted the same."

From this it appears that the seizure must be made in a county, and that the case can only be heard by justices of the county where it is made — "*two justices of the peace of the county where such seizure shall have been made.*" The seizure in this case, as specially found by the jury, was not made in Monmouth county, but the justices who tried the case were justices of that county. Consequently the justices had no jurisdiction, and the record had no validity.

§ 1133. *A seizure to enforce a forfeiture is a single act and not continuous.*

It is argued that the seizure was continuous in its character, and became a seizure in Monmouth county when the sloop was carried into that county. This position is untenable. Suppose the seizure had been made in Cumberland county, in Delaware bay, could the sloop have been carried around to Monmouth county, and there condemned on the ground that the seizure was continuous, and became finally a seizure in Monmouth county? This would hardly be contended. But it is said that the seizure was made within the state, off the county of Monmouth, and not within the limits of any county; and hence, that Monmouth county was the first county in which the seizure took place. If this had been true (as it undoubtedly was), and the jury had so found, still it would not have helped the case. The major proposition is not correct. A seizure is a single act and not a continuous fact. Possession, which follows seizure, is continuous. It is the seizure which must be made within the country where the vessel is to be proceeded against and condemned. The case may have been a *casus omissus* in the law; it is certainly not included in it.

As this disposes of all the errors which have been assigned, the judgment must be affirmed.

#### GREEN v. VAN BUSKIRK.

(7 Wallace, 139-152. 1868.)

ERROR to the Supreme Court of New York.

STATEMENT OF FACTS.—One Bates, of Troy, New York, owned certain iron safes in Chicago, Illinois, and executed to Van Buskirk, in New York, a mortgage on the same. Afterwards one Green, in Illinois, attached the safes and had them sold. At the time of the levy of the attachment Green had no notice of the mortgage; it had not then been recorded in Illinois, and the pos-

session of the safes had not been delivered. Van Buskirk and others, though notified of the attachment, did not become parties to the case. Van Buskirk sued Green in New York for converting the property. The court held that the case was to be determined by the laws of New York, and that the mortgage took precedence of the attachment. The judgment was affirmed in the highest court of the state, and Green took the case to this court by writ of error, where a motion to dismiss for want of jurisdiction was overruled.

Opinion by MR. JUSTICE DAVIS.

That the controversy in this case was substantially ended when this court refused (5 Wall., 312) to dismiss the writ of error for want of jurisdiction is quite manifest by the effort which the learned counsel for the defendants in error now make to escape the force of that decision.

The question raised on the motion to dismiss was, whether the supreme court of New York, in this case, had decided against a right which Green claimed under the constitution and an act of congress. If it had, then this court had jurisdiction to entertain the writ of error, otherwise not. It was insisted on the one side, and denied on the other, that the faith and credit which the judicial proceedings in the courts of the state of Illinois had by law and usage in that state were denied to them by the supreme court of New York in the decision which was rendered.

Whether this was so or not could only be properly considered when the case came to be heard on its merits; but this court, in denial of the motion to dismiss, held that the supreme court of New York necessarily decided *what* effect the attachment proceedings in Illinois had by the law and usage in that state; and as it decided against *the* effect which Green claimed for them, this court had jurisdiction under the clause of the constitution which declares "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings in every other state," and the act of congress of 1790, which gives to those proceedings the same faith and credit in other states that they have in the state in which they were rendered.

This decision, supported as it was by reason and authority, left for consideration, on the hearing of the case, the inquiry whether the supreme court of New York did give to the attachment proceedings in Illinois the same effect they would have received in the courts of that state.

§ 1134. *The laws of Illinois on chattel mortgages and attachment on personal property, and the construction given them by the courts there.*

By the statutes of Illinois, any creditor can sue out a writ of attachment against a non-resident debtor, under which the officer is required to seize and take possession of the debtor's property, and if the debtor cannot be served with process he is notified by publication, and if he does not appear, the creditor, on making proper proof, is entitled to a judgment by default for his claim, and a special execution is issued to sell the property attached. The judgment is not a lien upon any other property than that attached; nor can any other be taken in execution to satisfy it. These statutes further provide that mortgages on personal property have no validity against the rights and interests of third persons without being acknowledged and recorded, unless the property be delivered to and remain with the mortgagee.

And so strict have the courts of Illinois been in construing the statute concerning chattel mortgages, that they have held, if the mortgage cannot be acknowledged in the manner required by the act, there is no way of making it effective except to deliver the property, and that even actual notice of the



mortgage to the creditor, if it is not properly recorded, will not prevent him from attaching and holding the property. *Henderson v. Morgan*, 26 Ill., 431; *Porter v. Dement*, 35 id., 479.

The policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it. If between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, get a lien on it; for an attaching creditor stands in the light of a purchaser, and as such will be protected. *Thornton v. Davenport*, 1 Scam., 296; *Strawn v. Jones*, 16 Ill., 117. But it is unnecessary to cite any other judicial decisions of that state but the cases of *Martin v. Dryden*, 1 Gilm., 187, and *Burnell v. Robertson*, 5 id., 282, which are admitted in the record to be a true exposition of the laws of Illinois on the subject to establish that *there* the safes were subject to the process of attachment, and that the proceedings in attachment took precedence of the prior unrecorded mortgage from Bates.

If Green, at the date of the levy of his attachment, did not know of this mortgage, and subsequently perfected his attachment by judgment, execution and sale, the attachment held the property, although at the date of the levy of the execution he did not know of it. The lien he acquired, as a *bona fide* creditor, when he levied his attachment without notice of the mortgage, he had the right to perfect and secure to himself, notwithstanding the fact that the mortgage existed was known to him before the judicial proceedings were completed. This doctrine has received the sanction of the highest court in Illinois through a long series of decisions, and may well be considered the settled policy of the state on the subject of the transfer of personal property. If so the effect which the courts there would give to these proceedings in attachment is too plain for controversy. It is clear if Van Buskirk had selected Illinois instead of New York to test the liability of these safes to seizure and condemnation, on the same evidence and pleadings, their seizure and condemnation would have been justified.

It is true the court in Illinois did not undertake to settle in the attachment suit the title to the property, for that question was not involved in it, but when the true state of the property was shown by other evidence, as was done in this suit, then it was obvious that by the laws of Illinois it could be seized in attachment as Bates' property.

In order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence, outside of the record, the predicament of the property on which it operated. This was done in this case, and determined the effect the attachment proceedings in Illinois produced on the safes, which effect was denied to them by the supreme court of New York.

At an early day in the history of this court the act of congress of 1790, which was passed in execution of an express power conferred by the constitution, received an interpretation which has never been departed from (*Mills v. Duryee*, 7 Cr., 481), and obtained its latest exposition in the case of *Christmas v. Russell*, 5 Wall., 290 (§§ 1121-25, *supra*).

The act declares that the record of a judgment (authenticated in a particular manner) shall have the same faith and credit as it has in the state court from whence it is taken. And this court say: "Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it;" and that "it is only necessary to inquire in every case what is the effect of a judgment in the state where it is rendered."

§ 1135. *Wherein the "full faith and credit," required by the constitution of the United States, had not been given in one state to the judicial proceedings of another state.*

It should be borne in mind in the discussion of this case that the record in the attachment suit was not used as the foundation of an action, but for purposes of defense. Of course Green could not sue Bates on it because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But as, by the law of Illinois, Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another state for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a state the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings.

Attachment laws, to use the words of Chancellor Kent, "are legal modes of acquiring title to property by operation of law." They exist in every state for the furtherance of justice, with more or less of liberality to creditors. And if the title acquired under the attachment laws of a state, and which is valid there, is not to be held valid in every other state, it were better that those laws were abolished, for they would prove to be but a snare and a delusion to the creditor.

The vice-chancellor of New York, in *Cochran v. Fitch*, 1 Sandf. Ch., 146, when discussing the effect of certain attachment proceedings in the state of Connecticut, says: "As there was no fraud shown, and the court in Connecticut had undoubted jurisdiction *in rem* against the complainant, it follows that I am bound in this state to give to the proceedings of that court the same faith and credit they would have in Connecticut." As some of the judges of New York had spoken of these proceedings in another state, without service of process or appearance, as being nullities in that state and void, the same vice-chancellor says: "But these expressions are all to be referred to the cases then under consideration, and it will be found that all those were suits brought upon the foreign judgment as a debt, to enforce it against the person of the debtor, in which it was attempted to set up the judgment as one binding on the person."

The distinction between the effect of proceedings by foreign attachments, when offered in evidence as the ground of recovery against the person of the debtor, and their effect when used in defense to justify the conduct of the attaching creditor, is manifest and supported by authority. *Cochran v. Fitch*, 1 Sandf. Ch., 146; *Kane v. Cook*, 8 Cal., 449. Chief Justice Parker, in *Hall v. Williams*, 6 Pick., 232, speaking of the force and effect of judgments recovered in other states, says: "Such a judgment is to conclude as to everything over which the court which rendered it had jurisdiction. If the property of the citizen of another state, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive."

It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court that pronounced the judgment in this case induces us to notice the ground on which they rested their decision. It is that the law of the state of New York is to govern this transaction, and not the law of the state of Illinois, where the property was situated; and as, by the law of New York, Bates had no property in the safes at the date of the levy of the writ of attachment, therefore none could be acquired by the attachment.

§ 1136. *The fiction of law that the domicile of the owner draws to it the personal estate which he owns, wherever it may happen to be located, yields whenever for the purposes of justice the actual situs of the thing should be examined.*

The theory of the case is that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, "yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined." It has yielded in New York on the power of the state to tax the personal property of one of her citizens situated in a sister state (*The People ex rel. Hoyt v. The Commissioner of Taxes*, 23 N. Y., 225), and always yields to "laws for attaching the estate of non-residents, because such laws necessarily assume that property has a *situs* entirely distinct from the owner's domicile." If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there and was protected in its ownership by the laws of the state; and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer and subject it to process and execution in her own way and by her own laws.

We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the state where the property is located has prescribed a different rule of transfer with that of the state where the owner lives.

We have been referred to the case of *Guillander v. Howell*, 35 N. Y., 657, recently decided by the court of appeals of New York, and as we understand the decision in that case it harmonizes with the views presented in this opinion. A citizen of New York owning personal property in New Jersey made an assignment, with preferences to creditors, which was valid in New York but void in New Jersey. Certain creditors in New Jersey seized the property there under her foreign attachment laws and sold it, and the court of appeals recognized the validity of the attachment proceeding and disregarded the sale in New York. That case and the one at bar are alike in all respects except that the attaching creditor there was a citizen of the state in which he applied for the benefit of the attachment laws, while Green, the plaintiff in error, was a citizen of New York; and it is insisted that this point of difference is a material

element to be considered by the court in determining this controversy, for the reason that the parties to this suit, as citizens of New York, were bound by its laws. But the right under the constitution of the United States and the law of congress which Green invoked to his aid is not at all affected by the question of citizenship. We cannot see why, if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other states equal privileges with her own in her foreign attachment laws, that the judgment against the personal estate, located in her limits, of a non-resident debtor, which a citizen of New York lawfully obtained there, should have a different effect given to it under the provisions of the constitution and the law of congress, because the debtor, against whose property it was recovered, happened also to be a citizen of New York.

The judgment of the supreme court of the state of New York is reversed, and the cause remitted to that court with instructions to enter judgment for the plaintiff in error.

#### KNOWLES v. GASLIGHT AND COKE COMPANY

(19 Wallace, 58-62. 1873.)

ERROR to U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.—This was a suit against Knowles on a judgment rendered by default against him and one Harvey, in the circuit court for Cass county, Indiana. The return of the sheriff in that suit was as follows: "I do hereby certify that I served the within writ, on the 14th of September, 1865, upon Alfred Knowles and Thomas Harvey, personally, by reading the same to them. And I further certify that J. W. Bain cannot be found in my bailiwick."

Knowles contends in the present suit that this return is not sufficient, because it does not show that service was made in the proper county. He also offered to prove that the process was not served, and that the return was false. He was overruled on both points. The defendants were not residents of Indiana.

§ 1137. *Presumption that service was made in the proper county.*

Opinion by MR. JUSTICE BRADLEY.

Upon the first point, that the return was insufficient, the plaintiff in error relies on a decision of Mr. Justice Nelson, at the circuit, in the case of *Allen v. Blunt*, in which it is supposed to have been held that a return of service by the United States marshal, without showing that the service was made in his district, was insufficient to give the court jurisdiction of the person. What Justice Nelson held in that case was this: that inasmuch as the eleventh section of the judiciary act declares that "no suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ," therefore, the jurisdiction of said courts depends on service or inhabitancy in the district, one of which should appear of record; and inasmuch as the record in that case contained no allegation on the subject, and the jurisdiction of the court depended entirely on the marshal's return to the process, the return was insufficient to give it. This authority, therefore, is not in point. The case was in the United States court, and depended upon the peculiar phraseology of the act of congress referred to therein; whereas the case in Cass county, now under

consideration, was in a state court; and it is familiar law that a court of general jurisdiction will be presumed to have had jurisdiction of the cause and the parties until the contrary appears. In our judgment, therefore, the return, on its face, shows no ground of error. It will be presumed that the service was made in the proper county.

§ 1138. *In a suit on a judgment defendant may show that he was not served with process in the original suit.*

But the defendant also offered to prove by himself and Harvey that neither of them had ever in fact been served with process, and that, in consequence, the court had never, as to them, acquired jurisdiction of the person.

As this subject has been lately considered by us in the case of *Thompson v. Whitman*, it is unnecessary to go over the subject again. In our opinion the defendant had a right to show by proof that he had never been served with process, and that the circuit court of Cass county never acquired jurisdiction of his person. As this was refused him on the ground that the evidence was inadmissible, the judgment must be reversed. We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the state in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state. But in the case of non-residents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears. Judgment reversed, and a *venire de novo* awarded. (a)

#### HILL v. MENDENHALL.

(21 Wallace, 458-459. 1874.)

ERROR to U. S. Circuit Court, Eastern District of North Carolina.

STATEMENT OF FACTS.—Suit upon a judgment of a state court of Minnesota. On the trial of a plea of *nul tiel record* the record offered in evidence showed that the defendant was not a resident of Minnesota; that he was served by publication, but that he appeared by attorney, filed an answer by an agent, and submitted himself to the jurisdiction of the court.

§ 1139. *A record which shows an appearance by attorney will bind the party until it is proved that the attorney acted without authority.*

Opinion by WAITE, C. J.

It is true the record sued upon in this case does show that defendant was not served with process, but it also shows his voluntary appearance by an attorney. If this appearance was authorized, it is as effective for the purposes of jurisdiction as an actual service of summons. When an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind the party until it is proven that the attorney acted without authority.

Since the cases of *Thompson v. Whitman*, 18 Wall., 457 (§§ 1131-33, *supra*), and *Knowles v. Gaslight and Coke Company*, 19 id., 58 (§§ 1137-38, *supra*), it may be considered as settled in this court, that when a judgment rendered in one state is sued upon in another, the defendant may contradict the record to

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(a) Reversing *Logansport Gas Co. v. Knowles*,\* 2 Dill., 421.

the extent of showing that in point of fact the court rendering the judgment did not have jurisdiction of his person. If such showing is made the action must fail, because a judgment obtained under such circumstances has no effect outside of the state in which it was rendered.

§ 1140. *Evidence under plea of nul tiel record.*

But if it appears on the face of the record that the court did have jurisdiction, extrinsic evidence to contradict it is not admissible under a plea of *nul tiel record*. The office of pleading is to inform the court and the parties of the facts in issue; the court, that it may declare the law, and the parties, that they may know what to meet by their proof. *Nul tiel record* puts in issue only the fact of the existence of the record, and is met by the production of the record itself, valid upon its face, or an exemplification duly authenticated under the act of congress. A defense requiring evidence to contradict the record must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect. It should, therefore, be formally pleaded in order that the facts upon which it is predicated may be admitted or put in issue. Under the common law system of pleading this would be done by a special plea. The equivalent of such a plea is required under any system. The precise form in which the statement should be made will depend upon the practice of the court in which it is to be used, but it must be made in some form. Defects appearing on the face of the record may be taken advantage of upon its production under a plea of *nul tiel record*, but those which require extrinsic evidence to make them apparent must be formally alleged before they can be proven. This we believe to be in accordance with the practice of all courts in which such defenses have been allowed, and it is certainly the logical deduction from the elementary principles of pleading. *Bimeler v. Dawson*, 4 Scam., 538; *Harrod v. Barretto*, 2 Hall, 302; *Shumway v. Stillman*, 6 Wend., 447; *Starbuck v. Murray*, 5 id., 148; *Price v. Hickok*, 39 Vt., 292; *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H., 482; *Holt v. Alloway*, 2 Blackf., 108; *Moulin v. Insurance Co.*, 4 Zab., 222; *Gilman v. Lewis*, id., 248; *Aldrich v. Kinney*, 4 Conn., 380. In *Knowles v. Gaslight and Coke Company*, the issue was directly made by an averment of jurisdiction in the complaint and a denial in the answer, and in *Thompson v. Whitman* by plea and replication.

It follows that, upon the pleadings in this case, judgment should have been given for the plaintiff after proof of the record, showing as it did jurisdiction of the defendant by reason of his appearance by attorney. As both parties, however, submitted evidence without objection upon the question of the authority of the attorney so to appear, we should have held them to a waiver of the proper pleadings to present that issue if it appeared affirmatively that this evidence had been considered and passed upon by the court below. Such, however, is not the case. Judgment was given for the defendant upon the sole ground that it did not appear from the record or the evidence that summons had been served. This was error if the defendant had in fact voluntarily appeared. The record upon its face furnished evidence of such an appearance. The court did not find that this evidence was not in accordance with the facts.

The judgment of the circuit court is, therefore, reversed, and the cause remanded with instructions to award a *venire de novo*, and permit such amendments to the pleadings as may be necessary to present fairly for trial the real issues between the parties.

*Reversed and remanded.*

## BURT v. DELANO.

(Circuit Court for Massachusetts: 4 Clifford, 611-618. 1878.)

Opinion by CLIFFORD, J.

STATEMENT OF FACTS.—Subject to the qualification that judgments are open to inquiry as to the jurisdiction of the court where they were given, and as to notice to the defendant, the judgment of a state court not reversed by a superior court, nor set aside by a direct proceeding in chancery, is conclusive in the courts of all the other states where the subject-matter in controversy is the same. *Christmas v. Russell*, 5 Wall., 291 (§§ 1121-25, *supra*); *Mills v. Duryee*, 7 Cranch, 483; 2 Story, Const. (3d ed.), 1313; *Bissell v. Briggs*, 9 Mass., 462. Judgment was rendered in a state court of California in favor of the plaintiffs, citizens of that state, against John G. Wright, Lester Goodwin, and James Delano, citizens of Massachusetts, doing business in the latter state under the firm name of Wright, Goodwin & Delano. Service of the writ in that suit was made upon the defendant, James Delano, in California, he being then transiently in that state. No service was made upon either of the other defendants. By the terms of the judgment it was "to bind the partnership property of all the defendants in said action, but if there be no partnership property, or if there be not sufficient thereof to satisfy said judgment, then the judgment, or any deficiency therein, shall be satisfied out of the separate and individual property of defendant Delano alone."

Suit in due form is commenced here, which is equivalent to an action of debt at common law, leave being given to refer to the declaration and answer, and to the California record and the statutes of that state. Judgment is to be rendered for the plaintiff if the action is maintainable, otherwise for the defendant.

Sufficient appears to show that the former suit was against all of the members of the firm, but that service was made only on the present defendant, the other two members of the firm not being found in the state where the suit was brought; that the present defendant employed counsel and made defense, both for himself and in behalf of the firm, but that no appearance in the case was entered for the partnership. Delano appeared for himself and filed a counterclaim as due to the firm, but no appearance was entered for any one except the party served.

§ 1141. *Judgment without notice is void outside of the state where rendered.*

Nothing is shown to warrant the conclusion that any property of the partnership was found in that state. Without service upon the other two members of the firm, judgment was rendered against all three, subject to the condition already reproduced. Outside of the state where the judgment was rendered, it is clear that the judgment as to the members of the firm is null and void, as they had no notice of the suit; and it appears to be equally clear that it was without legal effect even as against those defendants in that state, as the partnership held no property within the jurisdiction of the court.

§ 1142. *Personal judgment without validity, when.*

Personal judgments are without any validity if rendered by a state court in an action upon a money demand against a non-resident of the state, upon whom no personal service of process was made within the state, unless he appeared and answered to the action, nor will such a judgment affect his property beyond what he possessed in the state where the suit was brought. *Pennoyer v. Neff*, 95 U. S., 714. Concede that, and still it is contended that the

judgment is equally invalid where the suit is against two or more non-residents, and only one was served; that it is of no greater validity as to the one served than as to those not served. Support to that proposition is certainly found in the rules of the common law, but the court is of the opinion that the statutes of California provide otherwise. In case of no partnership property, or any deficiency of such property, the condition of the judgment was, that the judgment or deficiency should be satisfied from the separate and individual property of said Delano.

In a suit against a partnership, if one partner is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction, even though, by the *lex loci*, a service on the partner resident within the jurisdiction is sufficient to authorize a judgment against all the partners.

Attorneys may, in many cases, enter a general appearance, but in an action against a partnership such an appearance must be construed to be an appearance for the partners as partners, and for the purpose of defending the action against the partnership, and not as an appearance for the partners individually, severally, and personally, so as to render a judgment against the partnership in such action binding on an individual partner in another jurisdiction, by whom such an appearance was not authorized. One partner has no implied power to enter an appearance in a suit except for the partnership, and cannot, by such an appearance, bind a partner personally and individually who is not within the jurisdiction, and has not been served with process. *Phelps v. Brewer*, 9 Cush., 390. Remarks are found in the opinion of the court in *Bennett v. Stickney*, 17 Vt., 532, somewhat at variance with the ruling of the court in the preceding case, but the difference of opinion between the two courts is immaterial in the case before the court.

Due service having been made upon the defendant in the former suit, the sole question is, whether the judgment rendered against him is binding and operative, which must depend in this case upon the California statutes (Code Civ. Pro., § 414): "When the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants." Three in this case were liable on the contract, and one only was served, and it is clear that the judgment, under the rule prescribed by that provision, is a valid judgment against the defendant served, and if valid in the state where the judgment was rendered it is equally valid in all the other states, and in the circuit court of the United States. Conclusive authority to that effect is found in the reported decision of the supreme court of Massachusetts. *Stockwell v. McCracken*, 109 Mass., 87. Special reference is made in that case to the statute laws of California, which contain the same provision as the code, and the court remarks that that provision, if in force, shows that the judgment would be good against the party personally served, however defective the service may have been against the other party. Viewed in the light of these suggestions, it is clear that the plaintiff is entitled to judgment for the amount of the judgment set forth in the declaration, with interest, as damages, at the rate of six per cent. *Barringer v. King*, 5 Gray, 12. Judgment for plaintiff.



## ST. CLAIR v. COX.

(16 Otto, 350-360. 1882.)

ERROR to U. S. Circuit Court, Eastern District of Michigan.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This action was brought by the plaintiff in the court below, to recover the amount due on two promissory notes of the defendants, each for the sum of \$2,500, bearing date on the 2d of August, 1877, and payable five months after date, to the order of the Winthrop Mining Company, at the German National Bank, in Chicago, with interest at the rate of seven per cent. per annum.

To the action the defendants set up various defenses, and, among others, substantially these: That the consideration of the notes had failed; that they were given, with two others of like tenor and amount, to the Winthrop Mining Company, a corporation created under the laws of Illinois, in part payment for ore and other property sold to the defendants upon a representation as to its quantity, which proved to be incorrect; that only a portion of the quantity sold was ever delivered, and that the value of the deficiency exceeded the amount of the notes in suit; that at the commencement of the action, and before the transfer of the notes to the plaintiff, the Winthrop Mining Company was indebted to the defendants in a large sum, viz., \$10,000, upon a judgment recovered by them in the circuit court of Marquette county, in the state of Michigan, and that the notes were transferred to him after their maturity and dishonor, and after he had notice of the defenses to them.

On the trial evidence was given by the defendants tending to show that the plaintiff was not a *bona fide* holder of the notes for value. A certified copy of that judgment was also produced by them and offered in evidence; but on his objection that it had not been shown that the court had obtained jurisdiction of the parties, it was excluded, and to the exclusion an exception was taken. The jury found for him for the full amount claimed; and judgment having been entered thereon, the defendants brought the case here for review. The ruling of the court below in excluding the record constitutes the only error assigned.

The judgment of the circuit court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the state, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for \$6,450 by default. The officer to whom the writ of attachment was issued returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

The laws of Michigan provide for attaching property of absconding, fraudu-

lent and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws, 1871, secs. 6397 and 6413.

They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this state against any corporation created by or under the laws of any other state, government, or country, if a copy of such attachment and of the inventory of property attached shall have been personally served on any officer, member, clerk, or agent of such corporation within this state, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, secs. 6544 and 6550.

§ 1143. *Under what circumstances United States courts regard judgments of state courts as importing verity. Case cited and approved.*

The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or, what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In *Pennoyer v. Neff* we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a state to determine the *status* of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S., 714.

The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it.

Its character or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties arise; it is not so easy to determine who represent the corporation there and under what circumstances service on them will bind it.

§ 1144. *How and under what circumstances a foreign corporation can be sued. Cases cited.*

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In *McQueen v. Middleton Manufacturing Co.*, decided in 1819, the supreme court of New York, in considering the question whether the law of that state authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the state, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another state he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.), 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but, nevertheless, it has been accepted as correctly stating the law. It was cited with approval by the supreme court of Massachusetts, in 1834, in *Peckham v. North Parish in Haverhill*, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the commonwealth. 16 Pick. (Mass.), 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the state and transact business there on its account. *Libbey v. Hodgdon*, 9 N. H., 394; *Moulin v. Trenton Insurance Co.*, 24 N. J. L., 222.

This doctrine of the exemption of a corporation from suit in a state other than that of its creation was the cause of much inconvenience and often of manifest injustice. The great increase in the number of corporations of late years and the immense extent of their business only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one state, they carry on the most extensive operations in other states. To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and

agents of foreign corporations doing business therein. Whilst the theoretical and legal view that the domicile of a corporation is only in the state where it is created was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices and carried on its business there, it was in effect as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states for matters within the sphere of their agency is, in effect, serving process on it, as much so as if such agents resided in the state where it was created.

§ 1145. *A foreign corporation, as a condition to the permission to do business in a state, may be required to submit to a given form of serving legal process.*

A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Lafayette Insurance Co. v. French*, "These conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." 18 How., 404, 407 (Corp., §§ 1140-45); *Paul v. Virginia*, 8 Wall., 168 (Const., §§ 1052-59).

The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be

properly deemed representatives of the foreign corporation. The decision of this court in *Lafayette Insurance Co. v. French*, to which we have already referred, sustains these views.

§ 1146. *Under the laws of Michigan a record of a judgment against a foreign corporation, founded on service of process upon agent or officer, is not admissible in evidence if it does not appear that the corporation was doing business in that state.*

The state of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the state. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk or agent of such corporation" within the state, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that state is made to serve a double purpose,—as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words "agent of such corporation within this state." They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there. The decision in *Newell v. Great Western Railway Co.*, reported in the 19th of Michigan Reports, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the contract by removing him from its cars at an intermediate station. The declaration was served upon Joseph Price, the treasurer of the corporation, who was only casually in the state. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the state, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the state at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. "The corporate entity," said the court, "could by no possibility enter the state, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation

of the company here, the supposed representative would have to hold or enjoy in this state an actual present official or representative *status*. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, *the then official, the officer then in a manner impersonating the company, should be served*. Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official *status* or representative character in this state." Page 344.

According to the view thus expressed by the supreme court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state. This representation implies that the corporation does business or has business in the state for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the state, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former state, the supreme court of New Jersey said that a law of another state which sanctioned such service upon an officer accidentally within its jurisdiction was "so contrary to natural justice and to the principles of international law that the courts of other states ought not to sanction it." *Moulin v. Trenton Insurance Co.*, 24 N. J. L., 222, 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute — a member, for instance, of the foreign corporation, that is, a mere stockholder — is not a departure from the principle of natural justice mentioned in *Lafayette Insurance Co. v. French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ, or accompanying its service, or in the pleadings, or the finding of the court — that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

§ 1147. *Service of process upon an agent of a foreign corporation is not good unless it appears that his relations to his principal justify such service.*

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the state when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

*Judgment affirmed.*

**MOCH v. VIRGINIA FIRE & MARINE INSURANCE COMPANY.**

(Circuit Court for Virginia: 10 Federal Reporter, 696-710. 1882.)

**STATEMENT OF FACTS.**—Action on a judgment rendered in Louisiana on a policy of fire insurance issued by defendant through Taber, its agent, to plaintiff. Process was served on Taber in the Louisiana suit; there was a default, and a special appearance by defendant to set aside the judgment on the ground that it was not liable to be sued by process served on Taber. The exception was overruled and the judgment rendered. To this action upon the Louisiana record defendant pleaded that in compliance with the law of Louisiana it had an agent in that state, Douglas West, who alone was authorized to receive service of process, and that Taber was not its agent. To this plea plaintiff replied that in the Louisiana suit the agency of Taber to be sued for defendant had been raised and decided against defendant, and that it was estopped by that decision. To this replication defendant demurred.

Opinion by HUGHES, J.

This case is before me now on the defendant's demurrer to the plaintiff's replication. Avoiding technicalities, the plaintiff's contention is that the defendant was properly sued and brought into court in Louisiana by service of process upon such an agent of the defendant, John W. Taber, as could be served with the process under the laws of that state; that, besides, the defendant appeared to the suit there, pleaded defective service of process, claimed that it was not in court, and was overruled on that issue thus raised by itself, by a court of general and competent jurisdiction, and is therefore estopped from pleading the same matters here.

The contention of the defendant, technically alleged by its plea and set out argumentatively in the very able and learned brief of counsel, is that the citation served on Taber was insufficient to bring it into court; that its appearance there was only for the purpose of suggesting to the court its want of jurisdiction because of the matters alleged in its "exception" filed there; that it is not bound by the judgment of the court on that or any other question; and that the judgment is a nullity, and would be treated as such in Louisiana, and should be so treated here.

The first question presented to me, though it is not the pivotal one in this case, is whether the "exception," the "peremptory exception," used in the practice of Louisiana, is to be treated in common law courts as a plea by which

the defendant sets out matters of law and fact in defense of the action, and submits himself to the judgment of the court upon them, or is a mere suggestion or protest of record by which the defendant commits himself to nothing at all; as to which it matters not at all to him whether the court considers and passes upon it or not, and which, when entered of record, is a matter of futile surplusage.

§ 1148. *The decision of a court of general jurisdiction on the question of its jurisdiction of a case is to be regarded as conclusive in a suit in another state upon its record.*

Without meaning to refer to such "exceptions" in general, I have to say that, for reasons given in the sequel, I cannot take the latter view of the peremptory "exception" which was pleaded in the suit between these parties in Louisiana, the judgment in which is sued upon here. The Code of Practice in Louisiana defines peremptory exceptions to be "those which tend to the dismissal of the suit;" some of them relating to forms, others arising from the law. The exception in this case tended to the dismissal of the suit on the ground that, as a matter of law, the defendant could not be brought into court by service of process upon the agent who, as the petition alleged and the exception did not deny, negotiated the insurance, received the premiums, delivered the policy, and was the acting agent of the defendant in the city of Shreveport; could not, for the reason that he was not what the plea calls the "general" agent of the company in Louisiana, appointed in accordance with the law concerning non-resident insurance companies enacted in 1877.

I consider that such was the matter of law formally submitted for decision on the 12th of April, 1879, by defendant's counsel in the exception set out in the record; and though the court, in its judgment rendered on that day, probably after argument on the exception, does not expressly declare that the exception was formally overruled, yet that it was overruled is a necessary implication from the tenor of the judgment.

The court of Louisiana having decided that the defendant was before it by force of the service of citation on its agent Taber, and not merely by its appearance "alone to file" the exception, it may not be competent for me to pass upon the propriety of that decision; but I feel bound by the earnestness of defendant's contention to look behind the judgment of the court *a quo* into the validity of the process by which the defendant was held to have been brought into court.

§ 1149. *In what manner and under what circumstances a corporation of a state, doing business in another state, may be sued in that other state. Cases cited.*

That a corporation doing business in a state other than that from which its charter is derived, and in which its principal office is held and its chief business is conducted,—doing business there and everywhere else, as corporations must of necessity do, through the agency of natural persons,—may be sued and brought into court in that state by the service of process on its agent there, independently of any statute law or warrant of attorney expressly authorizing such service, has been very authoritatively decided.

The case of *Moulin v. Ins. Co.*, 1 Dutch., 57, was similar to the one at bar in its essential features, except that there, there was no conditional appearance in the original suit by the defendant. The defendant was a corporation chartered in New Jersey and having its principal office there. It established a branch office in Buffalo, New York, and did business there for awhile, but finally withdrew that office. Suit was afterwards brought against it there on



one of the policies issued from that agency, and process was served on its president, who was a resident of New Jersey and was casually in Buffalo, not on the business of his company. On the judgment obtained in the New York suit, thus commenced suit was brought in New Jersey. The pleadings in this latter suit were substantially identical with those in this, except as to the conditional appearance. The opinion was delivered by Chief Justice Green, who said:

“If a corporation may sue within a foreign jurisdiction it should seem consistent with sound principle that it should always be liable to be sued within such jurisdiction. The difficulty is this: that process against a corporation at common law must be served upon its principal officer within the jurisdiction of that sovereignty by which it was created. The rule is founded upon the principle that the artificial, invisible and intangible corporate body is exclusively the creature of the law; that it has no existence except by operation of law, and that, consequently, it has no existence without the limits of that sovereignty, and beyond the operation of those laws by which it was created and by whose power it exists. The rule rests upon a highly artificial reason, and, however technically just, is confined at this day, in its application, within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal, nay, it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has, then, existence, vitality, efficiency beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in the case of a private individual, and that the corporation itself is not present, the answer is that a corporation acts nowhere except by its officers and agents. It has no tangible existence except through its officers. For all practical purposes its existence is as real, as vital and efficient elsewhere as within the jurisdiction that created it. It may perform every act without the jurisdiction of the sovereignty which created it that it may within it. Its existence anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has; no body which may exist in one place and be served with process while its agents and officers are in another. Process can only be served upon the *officers* of a corporation within its own jurisdiction, not upon the corporation itself.

“Process cannot be served upon the officer of a corporation in a foreign jurisdiction, because he does not carry his official character and functions with him; and yet the officers and agents of corporations carry their official character and functions with them into foreign jurisdictions for the purpose of making contracts and transacting the business of the corporation. The seal of a corporation, its distinguishing badge, at common law the only evidence of its contracts, may be taken by its officers and used within a foreign jurisdiction.

“Doubts were formerly entertained whether a corporation could make a contract or maintain an action out of its own jurisdiction. These questions have been long since settled, either by judicial construction or legislative enactment, in accordance with the reason of the thing and usage of the commercial world. Sound principle requires that while the *powers* of corporations are world-wide, while for all practical purposes they may exist and act everywhere, the technical rule of the common law, that they exist only within the jurisdiction of the sovereignty which created them, should be applied only

within its strictest limits, and not be suffered to defeat the obvious claims of justice. . . .

"The question now before the court is not upon the validity of the common law principle; to that we adhere. . . . The utmost that can be said is that [the service in the suit in New York] was a deviation from the technical rule of the common law. The defendants were not condemned unheard and without an opportunity of making defense. The process was served precisely upon the officer, and in the mode that it would have been had the process been served in this state. The corporation, it is true, were drawn into the forum of a foreign sovereignty to litigate, but, having voluntarily entered that jurisdiction and transacted business there; having invoked the comity and the protection of the laws of that sovereignty for their benefit,—can they complain that the contracts there made are enforced within that sovereignty and in accordance with its laws? Does it involve the violation of any principle of natural justice, or that protection which is due to the citizens of our own state? If the corporation were carrying on its business within the state of New York at the time of the service of the process, this court has already intimated its opinion that the service would be valid. In 4 Zab., 234, Justice Elmer said: 'I think, under such circumstances, natural justice requires that corporations should be subject to the laws of the state whose comity they thus invoke. For the purpose of being sued, they ought to be regarded as voluntarily placing themselves in the situation of citizens of that state. And such, it seems, would be the rule independently of any express statute authorizing the mode of serving process. Angell & Ames, Corp., § 402. The fact that the corporation had ceased to transact business, whatever technical difficulty it may seem to create, cannot alter the reason and justice of the proceeding.'"

The learned judge distinguishes, of course, between corporations and natural persons, and applies his reasoning only to the former. He treats the existence of the New York statute authorizing the service of process on the officer of a non-resident corporation casually in that state as not affecting the decision of the court of New Jersey in the case. See *Bushel v. Com. Ins. Co.*, 15 Serg. & R., 176, and *Angell & Ames*, § 402. The doctrine thus ably laid down by Chief Justice Green has been sanctioned by the congress of the United States, as to the District of Columbia, by section 11 of chapter 64 of the acts of 1837 (14 Stat. at Large, 404), which provides that, in actions against foreign corporations brought in the District, all process may be served upon the agent of such corporation or person conducting its business in the District.

§ 1150. *A corporation doing business in another state must submit to the conditions prescribed by its laws. Cases cited.*

And in *Railroad Co. v. Harris*, 12 Wall., 65 (CORP., §§ 1166–74), Mr. Justice Swayne, speaking for the United States supreme court, said: A corporation "cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. *If it do business there, it will be presumed to have consented, and will be bound accordingly.*" This language was cited with approbation and adopted as a correct exposition of the law by the same court in *Railway Co. v. Whitten*, 13 Wall., 270, and in *Ex parte Schollenberg*, 96 U. S., 376.

The case of *Michael v. Ins. Co. of Nashville*, 10 La. Ann., 737, which was decided in 1855 (before the statute of 1877), sustains the decision in *Moulin v. Ins. Co.*, rendered in the same year. In it the supreme court of Louisiana not

only held that a non-resident corporation could be sued through its resident agent, but that this right could not be destroyed by a revocation of the powers of an agent previously to a suit. The policy sued upon in that case covered the year 1852. The property insured was burned in August of that year. Suit was brought on the 14th of October following, and citation served on W. A. Johnson, the agent through whom the policy was taken, in November, 1852. By its exception the defendant pleaded that the "agency of said insurance company in New Orleans had been some time since withdrawn." In support of the exception a telegraphic dispatch was proved, dated at Nashville on the 29th of September, 1852, and received the same day, declaring that the company had withdrawn its agency from New Orleans, and directing that risks should be declined after the 1st of October ensuing. The court held that the service of process was valid and effective.

The case of *Wright v. Liverpool, L. & G. Ins. Co.*, 30 La. Ann., 1186, is an authority only apparently contrary to this principle. It arose before the statute of 1877. It decided that a foreign corporation, represented by a general agent and local board of directors residing in New Orleans, could not be brought into court by a citation served on a local agent domiciled in one of the county towns of Louisiana, who was only authorized to receive applications for insurance and give binding receipts for the same, and who had not exercised or represented that he possessed any other authority. But in that case the corporation, by having a principal office, a general agent for all purposes, and a local board of directors in New Orleans, was practically domiciled there, and there was no hardship in requiring service of process to be made on its general agent. It was, besides, proved affirmatively that the agent in the interior had no other authority, and was known to have none other, than to take risks.

§ 1151. *Liability of a foreign corporation upon process served on its business agent. Louisiana statute of 1877.*

On the general principles so ably enforced by Chief Justice Green, I would not feel justified in treating as a nullity the judgment of the court of Louisiana virtually establishing the validity of the service of process on the business agent of a non-resident insurance company, issued to commence a suit founded on a transaction with that agent, even if there were no statute in Louisiana authorizing such service. But the statute of that state, passed in 1877, comes in aid of the general principle, and seems to have expressly rendered such an agent as Taber was amenable to the process which was served on him. Though the last clause of the first section of that act seems to imply that some one agent of every non-resident insurance company shall be the person empowered to be served with and to accept service of process for the whole state, yet the act speaks nowhere of a "general" agent, as the defendant's plea does; and the first clause of section 1, and the whole tenor of section 4, unite in providing that every agent who does business for a non-resident insurance company in the state, either in taking risks or receiving premiums, or transacting any business, shall first have been appointed and empowered respecting process, as provided in the first section. If so, then Taber must be presumed to have been so empowered, and the defendant would not be heard to deny that it has, in respect to him, complied with the requirements of the statute. For a corporation to seek to avoid its own contract by reason of a *misnomer* is reprehended by Lord Coke as a pernicious novelty, which "till this generation of late times was never read of in any of our books." *Sir Moyle Finch's Case*, 6

Rep., 65a. Surely a corporation's neglect to produce a certificate necessary to vindicate itself and its agent from crime should not be allowed to exempt it from liability for that agent's acts.

§ 1152. *When suit may be maintained upon a foreign judgment.*

There is abundant authority to show that a suit may be maintained upon a foreign judgment recovered in a county of which the defendant, even though a natural person, was a citizen or resident, according to the laws of that country, though process was never in fact served upon him at all; and that such a judgment will not be deemed void as repugnant to natural justice.

In *Douglas v. Forest*, 4 Bing., 686, the court of common pleas held that an action may be maintained in England upon a Scotch judgment recovered upon a debt contracted in Scotland by a native of that country, though the defendant was abroad when the cause of action accrued, though no process was served upon him, and though he never knew of the existence of the action. The laws of Scotland allowed such a suit as that in which the Scotch judgment was rendered. In *Bank of Australasia v. Nias*, 16 Ad. & Ell., 717, it appeared that the statute of a British colony authorized suits against members of a corporation individually for liabilities of the corporation collectively, in a manner unknown to the laws of England and seemingly repugnant to natural justice. But in an action in England, brought on a foreign judgment against one operator, founded on such a liability, it was held that a plea setting out such a fact is insufficient.

In *Becquet v. McCarthy's Ex'r*, 2 Barn. & Ad., 951, it appeared that the statute law of a British colony authorized that in suits against absent parties to contracts made in the colony process might be served on the attorney-general of the colony. In a suit in England upon a colonial judgment obtained after such service of process, it was held that such a law did not render void the judgment. In *Godard v. Gray*, L. R., 6 Q. B., 139, decided in 1870, where the contract sued upon abroad was made in England, and the foreign judgment obtained upon it was rendered on a misconstruction of the contract, yet in a suit in England upon this judgment the court held that the facts could not be gone into. See, also, *Schibbsy v. Westenholz*, L. R., 6 Q. B., 155. The defendants in these several cases were held to be estopped by the judgments of courts of competent jurisdiction abroad.

§ 1153. *The law of estoppel as applied to foreign judgments.*

The whole subject of foreign judgments *in personam* in their relation to the question of estoppel has been so fully discussed in *Bigelow on Estoppel* that I need not do more than refer to the many cases cited below and in that work. The author concludes his review of the subject by the remark that although parties to a foreign judgment are not ordinarily estopped to deny the jurisdiction of a foreign court, yet if in any case there had been an issue made in the foreign suit between the parties on this particular point (as was done in *Louisiana* between the parties to this suit), and this issue was decided in favor of the jurisdiction, the decision would probably bar a retrial of the same question in another forum between the same parties.

§ 1154. *Powers of a court to inquire into the jurisdiction of a foreign court. Cases cited.*

I admit that the law on the power of a court to inquire into the jurisdiction of a foreign court over parties defendant is very unsettled. This question and those of *res judicata* and estoppel have been considered or passed upon, severally or together, in 1 Kent, Comm., 261, 262, and notes; Story, Conf. Laws, § 608, references and note; 1 Rob. Pr., 219; 6 Rob. Pr., 437; 7 Rob. Pr., 109;

1 Smith, Lead. Cas., 1118-1146; 2 Smith, Lead. Cas., 828; Judge Moncure's opinion in *Bowler v. Huston*, 30 Gratt., 266; note to *Shuman v. Stillman* (from 6 Wend., 447), in 15 Am. Dec., 378; note to *Pixley v. Winchell* (7 Cow., 366), in 17 Am. Dec., 525; note to *Messier v. Goddard* (7 Yeates, 533), in 1 Am. Dec., 325; *Benton v. Burgot*, 10 Serg. & R., at 241; *Rocco v. Hackett*, 2 Bosw., 579; *Imrie v. Castrique*, 8 Com. B. (N. S.), 405; S. C. in error, L. R., 4 H. of L., 414.

The act of congress of May 26, 1790, chapter 11 (1 St. at Large, p. 122), provides that the records and proceedings of the courts of the several states, properly authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are taken. It was passed in pursuance of section 1 of article 4 of the constitution of the United States. It not only provides that such records shall be received as *evidence*, but, if in the state where judgment was rendered, it was evidence of the highest nature, namely, *record evidence*. This act of congress in declaring it to be the highest evidence declared the *effect* which the judgment was to have in all the courts of the United States. The principal federal authorities on this subject are *Mills v. Duryee*, 7 Cranch, 383-4; *Hampton v. McConnel*, 3 Wheat., 234; *Knowles v. Gaslight & Coke Co.*, 19 Wall., 58 (§§ 1137-38, *supra*); *Thompson v. Whitman*, 18 Wall., 457 (§§ 1131-33, *supra*); *Hill v. Mendenhall*, 21 Wall., 453 (§§ 1139-40, *supra*); *Lafayette Ins. Co. v. French*, 18 How., 404 (CORP., §§ 1140-45); *Williamson v. Berry*, 8 How., 496, 540; *Glass v. Sloop Betsey*, 3 Dal., 7; *Rose v. Himely*, 4 Cranch, 241; *Elliott v. Piersol*, 1 Pet., 323 (EV., §§ 2024-31); *Schrivver v. Lynn*, 2 How., 59; *D'Arcy v. Ketchum*, 11 How., 165 (§§ 1156-57, *infra*); *Webster v. Reid*, 11 How., 437; *Nations v. Johnson*, 24 How., 195 (APPEALS, §§ 1670-74); *Christmas v. Russell*, 5 Wall., 291, 305 (§§ 1121-25, *supra*); *Pennoyer v. Neff*, 95 U.S., 714. And on the subject of service of process on a corporation chartered in another sovereignty, see *Railroad Co. v. Harris*, 12 Wall., 65 (CORP., §§ 1166-74); *Railroad Co. v. Whitton*, 13 Wall., 270 (COURTS, §§ 585-88); and *Ex parte Schollenberger*, 96 U. S., 369 (COURTS, §§ 1356-58).

§ 1155. *The rule as to res adjudicata with reference to foreign judgments. Cases cited.*

It does not follow, however, that even though a home court may inquire into the jurisdiction of the court of another sovereignty, therefore the parties to a litigation there are not bound in the home court by the principle of *res judicata*. The two questions are distinct and should not be confounded. Whether or not Taber was "such an agent of the defendant as that service of citation upon him would bind the defendant and bring it into court," was the precise question presented to the court in Louisiana, not only *in ipsissimis verbis* by the defendant's exception, but by the showing of the record; and was the only question open to debate; for the proofs were apparently conclusive on the merits. This question was not only decided by the Louisiana court, but I think rightly decided, the court holding properly that the corporation was before it as defendant to the action, as well as before it for the special purpose of pleading to the jurisdiction.

Now, it is not denied that the court whose judgment I am considering was one of general jurisdiction, and, as such, competent to pass upon the validity of process issued by its clerk to bring a defendant before it; and there is very high authority, both in Louisiana and Virginia, holding that when such a court passes upon a question within its competency, in a litigation between two par-

ties, those parties are concluded in every other court but an appellate one on that question.

In the case of *Verneuil v. Harper*, 28 La. Ann., 893, there had been a proceeding by Feitel against Verneuil to revive a judgment obtained nine years before, to which an exception had been filed by Verneuil, denying his identity with the original defendant. After a hearing upon the proofs taken upon this issue, there had been judgment overruling the exception and reviving the original judgment. Upon this second judgment execution was issued and property about to be sold in satisfaction by Harper, the sheriff. Whereupon Verneuil filed a petition for an injunction, and got a rule to show cause why it should not be granted, to stay the sheriff's sale. The petition denied the identity of petitioner with the defendant in the original judgment; that is to say, set up the same defense in the last proceeding which had been made in the second. Feitel filed an exception in the nature of a plea of *res judicata*, which the court *a quo* sustained. The cause went up to the supreme court of Louisiana, which, in the opinion delivered, among other things, said:

"The question [of identity] was litigated at the instance of Verneuil himself; it was solemnly determined against his pretensions; and he took no appeal. . . . We are bound to assume that the decision was right. The presumption in such cases is in favor of the probity of witnesses and the intelligence of the judge. *Res judicata pro veritate accipitur*."

In the case of *Cox v. Thomas' Adm'x*, 9 Gratt., 323, Thomas had been a sheriff, and there was a motion in the circuit court of his county, by his administratrix, to recover from Cox, his deputy, and the sureties of Cox, the amount of a judgment which had been recovered against the administratrix for money which had been collected by the deputy on an execution issued out of the county court of that county. It appeared from the face of the judgment that the execution upon which the deputy had collected the money had issued from the county court on a judgment of the circuit court, although section 48 (1 Rev. Code of 1819, p. 542) required the creditor to move in the court whence the execution issued, and the record did not show jurisdiction in the circuit court by removal from the county court. The court of appeals held that removal must be presumed from the fact that the circuit court had given judgment. Judge Allen, in rendering the decision of the court of appeals of Virginia, said:

"If the jurisdiction of the circuit court extended over that class of cases, it was the province of the court to determine for itself whether the particular case was one within its jurisdiction. The circuit court is one of general jurisdiction. . . . The jurisdiction of the court to take cognizance of all controversies between individuals in proceedings at law need not (as in cases of limited and restricted jurisdiction) appear on the face of the proceedings. Where its jurisdiction is questioned, it must decide the question itself. Nor is it bound to set forth on the record the facts upon which its jurisdiction depends. Wherever the subject-matter is a controversy at law between individuals, the jurisdiction is presumed from the fact that it has pronounced the judgment; and the correctness of such judgment can be inquired into only by some appellate tribunal."

And then the learned judge, after showing that the circuit court had jurisdiction of the subject-matter involved, went on to say as to the parties: "The judgment in this case must be considered as conclusive for another reason. Both parties appeared, and the defendant either submitted to the jurisdiction

or it was decided against him. In such case, as President Tucker, in *Fisher v. Bassett*, 9 Leigh, 119, observed, the question whether the general jurisdiction of the court over matters of that description embraced the particular case, having been decided by its judgment, can never be raised again except by proceedings in error."

If the court of general jurisdiction, in rendering a judgment, has passed expressly upon the jurisdictional facts and found them sufficient, the parties and their privies are estopped in collateral actions to litigate the matter again. *Sheldon v. Wright*, 5 N. Y., 497; *Dyckman v. New York*, id., 434. The courts of one state will not allow parties to show that a court of another state has made an erroneous decision upon issues between the same parties raised before and decided by it. *Imrie v. Castrique*, 8 Com. Bench (N. S.), 405; and *S. C. in error*, L. R., 4 H. of L., 414. See, also, *Drury's Case*, 8 Coke, 141b; and *Tarlton v. Fisher*, Doug., 671.

These decisions are but examples, among many, to show that where a question, even a question of jurisdiction, has been once litigated between two parties by a court of general jurisdiction, it is to be treated as *res judicata* between the same parties in every other but an appellate forum; and that where, in a litigation between parties in such a court, the question of jurisdiction over parties must have been considered, another court will presume that the court *a quo* did consider it, and treat that question as *res judicata*.

No sound reason can be given why the principle should not apply in a domestic court against parties to a litigation in another sovereignty, before a court of general jurisdiction there. And, although the authorities show that the home court may look into the jurisdiction of the foreign court, both as to parties and subject-matter, yet they also show that the parties to the other litigation are bound by the principle of *res judicata* when they come into the domestic court.

While, therefore, this court is not precluded from looking behind the judgment of the court of Louisiana, and judging for itself of the validity of the process by which the defendant is claimed to have been brought into that court, yet that power of the court, which is established by the weight of the authorities, should not be confounded with the very distinct question, whether the parties to a litigation in a foreign court of general jurisdiction are not bound by its decree on an issue raised between themselves, whether that issue be on the validity of process there, or on the merits.

Though the principle laid down by Judge Allen does not apply to the prejudice of the power of this court to look behind the Louisiana judgment, it does apply to the plea of the defendant. If the defendant had not appeared by counsel as it did, the simple question here would have been upon the validity of the process that was served there, and of the judgment by default that was rendered there. But, having appeared in the court of general jurisdiction and formally submitted to that court the question whether Taber was such an agent as that service of citation upon him would bring it into court, and that court having decided against it the issue thus raised by itself, I am bound to consider the defendant estopped by the Louisiana judgment from retrying that question here.

On the whole case, in conclusion, I concur in the view taken of it by plaintiff's counsel in Louisiana, expressed in the language quoted in the brief of plaintiff's counsel here: "It appears to me that the appearance, called an exception, put at issue the agency of Taber. The plaintiff had broadly averred

in her petition that Taber was the agent of the defendant: that her contract was made with Taber as the agent of the defendant; that she paid the premiums to him as agent of the defendant; and that the defendant had ratified and confirmed the contract made by Taber, by accepting and using the premiums paid. These facts alleged by the plaintiff were the material substance of her case; and the paper called an exception was nothing more than an answer and denial of these material facts alleged by the plaintiff. That issue was tried, and proof made that Taber did make the contract, and no one else did, and the premiums did go to the defendant. It is true that no certificate was shown from the secretary of state, under the statute of 1877; but the defendant is always presumed to have complied with the law, and cannot be heard to say that he violated our laws by taking risks or transacting business so positively forbidden by law, in order to reap a reward or to avoid an obligation based upon his own wrong and turpitude."

The defendant's demurrer to the plaintiff's replication must be overrule

**D'ARCY v. KETCHUM.**

(11 Howard, 165-176. 1850.)

**Opinion by MR. JUSTICE CATRON.**

**STATEMENT OF FACTS.**—This case comes here on writ of error to the circuit court for the district of Louisiana, the proceeding below being by petition, according to the practice of that court.

It alleges, in substance, that about December, 1846, George H. Gossip and James D'Arcy were jointly and severally indebted to Ketchum, Rogers and Bement, who recovered a judgment against said Gossip and D'Arcy in the superior court of the city of New York, for \$1,418.81 and costs of suit, with interest on the principal sum after the rate of seven per cent., from February 1, 1840. "Which judgment," says the petition, "was duly and legally obtained and was and is valid and binding upon said debtors in the state of New York where the same was rendered."

Among others, D'Arcy took the following peremptory exception: "The defendant excepts that the judgment sued upon is not one upon which suit can be brought against the defendant in this court." The exception went to the merits, as it alleged that the action was not well founded, and was properly pleaded, in conformity to the three hundred and thirtieth section of the Code of Louisiana Practice, page 128. In the circuit court this exception was overruled, obviously on the assumption that the New York judgment was conclusive, and judgment was rendered against the defendant. And as this was done on an inspection of the record merely, as if *nul tiel record* had been pleaded, the question is whether the proceeding in New York bound D'Arcy.

It appears, among other things, that Gossip and D'Arcy were partners in trade, doing business in the name of Gossip & Co. They were jointly sued with two others. Process was served on Gossip, but none on D'Arcy, who was a citizen of Louisiana, and resided there. Gossip pleaded the general issue and gave notice of set-off, but at the trial permitted judgment to go against him by default, on which a jury assessed damages. On this verdict a judgment was rendered jointly against both Gossip and D'Arcy by the court in New York.

This proceeding was according to a statute of that state, which provides that "where joint debtors are sued and one is brought into court on process,



he shall answer the plaintiff, and if judgment shall pass for plaintiff, he shall have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court."

For a settled construction of this statute in the state of New York, we are referred to the following cases: *Dando v. Tremper*, 2 Johns., 87; *Bank of Columbia v. Newcomb*, 6 Johns., 98; *Taylor and Twiss v. Pettybone*, 16 Johns., 66; and *Carman v. Townsend*, 6 Wend., 206.

From these cases it appears that in the New York courts it is held "that such judgment is valid and binding on an absent defendant as *prima facie* evidence of a debt, reserving to him the right to enter again into the merits, and show that he ought not to have been charged," should he be sued on the judgment; and furthermore, that the original contract is merged and extinguished by the judgment. It follows, that as D'Arcy's defense was in effect a demurrer to the record evidence, it could not have been made in the courts of New York.

§ 1156. *A judgment rendered in one state against a citizen of another state, who has not been served with process nor appeared to the action, does not bind him.*

And this brings up the question whether the New York statute and the judgment founded on it bound a citizen of Louisiana not served with process; or, in other words, whether the judgment had the same force and effect in Louisiana that it had in New York. It is a question of great stringency. If it be true that this judgment has force and effect beyond the local jurisdiction where it was rendered, joint debtors may be sued in any numbers, and, if one is served with process, judgment may be rendered against all, by which means the debt will be established; and as it must happen, in numerous instances, that one debtor may be found in a state carrying on so great a portion of our commerce as New York does, this mode of proceeding against citizens of other states and persons residing in foreign countries may have operation in all parts of the world, and especially in the United States. If New York may pass such laws and render such judgments, so may every other state bind joint debtors who reside elsewhere, and who are ignorant of the proceeding. That countries foreign to our own disregard a judgment merely against the person, where he has not been served with process, nor had a day in court, is the familiar rule; national comity is never thus extended. The proceeding is deemed an illegitimate assumption of power, and resisted as mere abuse. Nor has any faith and credit or force and effect been given to such judgments by any state of this Union, so far as we know; the state courts have uniformly, and in many instances, held them to be void, and resisted their execution by a second judgment thereon; and, in so holding, they have altogether disregarded as inapplicable the constitution and laws of the United States. We deem it to be free from controversy that these adjudications are in conformity to the well-established rules of international law, regulating governments foreign to each other, and this raises the question whether our federal constitution and the act of congress founded on it have altered the rule?

The constitution declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

§ 1157. *The act of May 26, 1790, does not give any faith or credit to a judgment rendered by a state court without service of process upon the defendant or his appearance to the action. Such judgment is operative only within the state where it is rendered.*

By the act of May 26, 1790, congress prescribes, first, the mode in which the judicial records of one state shall be proved in the tribunals of another, to wit, that they shall be authenticated by a certificate of the clerk under the seal of the court, with a certificate of the presiding judge that the clerk's attestation is in due form. Secondly, "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

These provisions were considered by this court in the case of *Mills v. Duryee*, 7 Cranch, 483, where it was held that the recited sentence of the act of 1790 did declare the effect of a state judgment by enacting that it should have such faith and credit in every other state as it had in the courts of the state from whence it was taken; and that a judgment, where the defendant had been served with process, concluded such defendant from pleading *nil debet* when sued in another state on the record, and consequently from going behind the judgment and re-examining the original cause of action; that he was concluded by the record in like manner as he stood concluded in the state where the judgment was rendered.

This decision was made in 1813, and has since been followed as the binding and proper construction of the act of 1790, in cases where process has been served. But, as was then predicted (and as has been manifest ever since), great embarrassment must ensue if the construction on the facts of that particular case is applied to all others without exception.

In construing the act of 1790, the law as it stood when the act was passed must enter into that construction; so that the existing defect in the old law may be seen and its remedy by the act of congress comprehended. Now, it was most reasonable on general principles of comity and justice, that, among states and their citizens united as ours are, judgments rendered in one should bind citizens of other states where defendants had been served with process or voluntarily made defense.

As these judgments, however, were only *prima facie* evidence and subject to be inquired into by plea when sued on in another state, congress saw proper to remedy the evil and to provide that such inquiry and double defense should not be allowed. To this extent, it is declared in the case of *Mills v. Duryee*, congress has gone in altering the old rule. Nothing more was required.

On the other hand, the international law as it existed among the states in 1790 was, that a judgment rendered in one state assuming to bind the person of a citizen of another was void within the foreign state, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of courts of justice had binding force.

Subject to this established principle, congress also legislated; and the question is whether it was intended to overthrow this principle and to declare a new rule which would bind the citizens of one state to the laws of another; as must be the case if the laws of New York bind this defendant in Louisiana. There was no evil in this part of the existing law and no remedy called for, and, in our opinion, congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments

as they had in the state where made. The language employed is not only fairly open to construction, but the result arrived at by the court below depends on construction; and when we look to the previous law, and the evil intended to be remedied by the framers of the constitution and by congress, we cannot bring our minds to doubt that the act of 1790 does not operate on, or give additional force to, the judgment under consideration; we concur with the various decisions made by state courts, holding that congress did not intend to embrace judicial records of this description, and are therefore of opinion that the defendant's exception was valid, and that the judgment must be reversed; and so order.

§ 1158. *Force and effect of.*—Under the constitution and laws of the United States a judgment has the same effect in every other state as in the one in which it was rendered. *Jacquette v. Hugunon*,\* 2 McL., 129; *Westerwelt v. Lewis*,\* 2 McL., 511.

§ 1159. Where the judgment of a state court is sued on in a federal court in another state, it is to be given the same effect and force as it would have if it had been rendered in the state. *Snyder v. Brachen*,\* 5 Biss., 60; *Crapo v. Kelly*, 16 Wall., 610.

§ 1160. Under the constitution and laws of the United States the faith and credit to be given a judgment of a sister state is the faith and credit which it would have in the state in which it was rendered, and not the faith and credit it would have if it had been rendered in the state where it is introduced in evidence. *Whitaker v. Bramson*, 2 Paine, 209 (§§ 12-20).

§ 1161. It is perfectly settled that, under the constitution and laws of the United States, a judgment or decree rendered in any of the United States by a court of competent jurisdiction, between the same parties, on the same subject-matter, has all the force and effect, in any other state, of a domestic judgment. *Sarchet v. The Sloop Davis*, Crabbe, 185.

§ 1162. When a judgment or decree has been given in one state by a court having jurisdiction of the parties and the subject-matter, it has the same force and effect, when pleaded or offered in evidence, in the courts of any other state. *Insurance Co. v. Harris*, 7 Otto, 331.

§ 1163. According to the constitution and laws of the United States and the decisions of the United States supreme court, the regular proceedings and decree of a county court in Virginia are allowed the same full faith and credit in Kentucky that they would receive in Virginia. If such a decree would be enforced in Virginia, or if such a decree pronounced in Kentucky would be enforced in Kentucky, the decree of the United States circuit court, sitting in Kentucky, enforcing it, was correct. *Caldwell v. Carrington*, 9 Pet., 86.

§ 1164. Although judgments obtained in different states are in fact proceedings of foreign and independent tribunals, yet under the constitution and acts of congress they bear the character of judgments of courts of concurrent powers with those where they are offered in evidence. *Whitaker v. Bramson*, 2 Paine, 209 (§§ 12-20).

§ 1165. A judgment, when sued on in another state than the one in which it was rendered, is conclusive in like manner as it would be if the suit were in the same state where the judgment was pronounced. *Field v. Gibbs*,\* 1 Pet. C. C., 155.

§ 1166. It was contended that a decree rendered by the United States circuit court for the district of Georgia, sitting in equity, was not conclusive on a federal court sitting in Pennsylvania, not coming within the purview of the first section of the fourth article of the constitution; but the latter court held otherwise, and declared that the judgment of a circuit court sitting in one state was not to be considered as a foreign judgment in another state, and examinable before either a federal or a state court sitting there. *Montford v. Hunt*,\* 8 Wash., 28.

§ 1167. A judgment in a state court is conclusive in every other state, and extinguishes the original cause of action. *Green v. Sarmiento*, Pet. C. C., 74.

§ 1168. The courts of the United States are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give them. *Galpin v. Page*, 3 Saw., 93.

§ 1169. A court is not required, by comity, to give to the decision of the court of another state any greater effect than would be given to it by the court rendering it. *Ackerly v. Vilas*,\* 16 Int. Rev. Rec., 154.

§ 1170. Upon the principle of the constitution of the United States, and the acts of congress, that full faith and credit shall be given in each state to the judicial proceedings of every other state, judgments, when sued on in another state, are to be considered of the same force and validity as in the state wherein they were originally rendered. So where a judgment sued on was discharged by insolvency proceedings in the state in which it was rendered, no action can be maintained on it in a federal court. *Davidson v. Smith*, 1 Biss., 346.

§ 1171. — **alleged error.**—The fourth article of the constitution of the United States, which declares in section 1 that "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," cannot, by any just construction of its words, be held to embrace an alleged error in a decree of a state court, asserted to be in collision with a prior decision of the same court in the same case. *Mitchell v. Lenox*, 14 Pet., 49.

§ 1172. — **divorce.**—A decree of divorce, valid where it is rendered, is, under the constitution and laws of the United States, valid everywhere else therein. *Cheever v. Wilson*, 9 Wall., 108.

§ 1173. — **interlocutory or final decree.**—No greater effect can be given to any judgment of a court of one state in another state than was given to it in the state where rendered. And a decree held by the highest court of the state where it was rendered to be interlocutory will not be regarded as final in another state. *Board of Public Works v. Columbia College*, 17 Wall., 521.

§ 1174. — **unconstitutional statute.**—A judgment, conclusive where it was rendered, is conclusive in the courts of the United States in another state: and the statute of Mississippi providing that no action should be maintained on any judgment or decree rendered without the state, against a resident of the state, where the cause of action would have been barred in Mississippi at the time suit was brought, is unconstitutional, being contrary to article IV, section 1, of the constitution of the United States. *Christmas v. Russell*, 5 Wall., 291 (§§ 1121-25).

§ 1175. — **creditors' bill.**—A judgment of one state has no force in another save what it derives from the laws of that other state and the provision of the constitution of the United States which relates to its effect as evidence. A judgment of one state cannot be the foundation for a creditors' bill in another. It must be sued over in such other state before it becomes a judgment for the purposes of any remedy there at law or in equity. *Claffin v. McDermott*, 12 Fed. R., 375.

§ 1176. **Verdict.**—A verdict in one state is not conclusive when sued on in a federal court in another state. *Peck v. Williamson*,\* 1 Car. Law Rep., 58.

§ 1177. **Administrators in different states.**—An action of debt will not lie against an administrator in one of the United States on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state. *Stacy v. Thrasher*, 6 How., 44.

§ 1178. **Mistake in name.**—Where judgment was recovered in Ohio against an insurance company by an erroneous name, but the suit upon the judgment was brought in Indiana against the company, using its chartered name correctly, accompanied by an averment that it was the same company, this mistake is no ground of error. *Lafayette Ins. Co. v. French*, 18 How., 405.

§ 1179. **Presumptions.**—Where the record of a judgment of another state is introduced in evidence, it will be presumed that it conforms to the law or usage of that state so far as it purports to go. *Whitaker v. Bramson*, 2 Paine, 209 (§§ 12-20).

§ 1180. **Construction of constitutional provision.**—In construing the constitutional provision and the act of congress relating to the faith and credit to be given judgments in other states than that in which they are rendered, the decisions of the supreme court of the United States are conclusive. That court has appellate jurisdiction over the state courts upon this subject. *Westerwelt v. Lewis*,\* 2 McL., 511.

§ 1181. **Authentication.**—The judgment of a United States court is admissible in evidence when authenticated in the manner provided by the act of congress of 1790. *Buford v. Hickman*, Hemp., 232.

§ 1182. In certifying the record of a judgment for the purpose of suing thereon in another state, the seal of the court ought to be attached to the record and not to the certificate of the judge authenticating the certificate of the clerk. The certificate of the judge is no part of the record. *Turner v. Waddington*,\* 8 Wash., 126.

§ 1183. The act of congress of May, 1790, declares that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court in the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form. It is held that a record of a judgment in which the certificate of the clerk is attested by "one of the judges of the supreme court of Tennessee," is not admissible in evidence. *Stewart v. Gray*,\* Hemp., 94.

§ 1184. In a suit upon a judgment of another state a certificate of the clerk of the court from which the record comes, that it is "a true and faithful copy of the proceedings had in the said court in the said cause," is a sufficient certificate. *Maxwell v. Stewart*,\* 21 Wall., 71.

§ 1185. **Jurisdiction.**—The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state

applies to the records and proceedings of courts only so far as they have jurisdiction. Whenever they want jurisdiction the records are not entitled to credit. *Board of Public Works v. Columbia College*, 17 Wall., 521.

§ 1183. Neither the clause in the constitution with reference to the credit to be given to judgments in other states than those in which they are rendered, nor the act of congress passed in pursuance of this provision, precludes an inquiry into the jurisdiction of the court in which the judgment was given, or the right of the state to exercise authority over the parties or the subject-matter of the judgment. *Galpin v. Page*, 8 Saw., 93.

§ 1187. Under the federal constitution and the acts of congress in pursuance thereof, the judgment of a state court is conclusive upon the courts of all the other states where the same matter is brought in controversy, except, however, that the question of jurisdiction and of notice to the defendant may be inquired into. *Christmas v. Russell*, 5 Wall., 291 (§§ 1121-1125).

§ 1188. Service of process.—Where a corporation, chartered by the state of Indiana, was allowed, by a law of Ohio, to transact business in the latter state upon condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment against the corporation obtained by means of such process ought to have been received in Indiana with the same faith and credit that it was entitled to in Ohio. *Lafayette Ins. Co. v. French*, 18 How., 404.

§ 1189. A judgment recovered in New York against a corporation in order to reach property situated there is entitled to no more force in Massachusetts than in New York, and there it does not bind the members individually; and when recovered without actual notice to the corporation in Massachusetts its validity at all in the latter place is questionable. *Sumner v. Marcy*, 8 Woodb. & M., 105.

§ 1190. — by publication.—A personal judgment rendered against the defendants jointly, some of whom have been served with process by publication only, is not evidence outside the state in which it was rendered of the personal liability of those so served. *Board of Public Works v. Columbia College*, 17 Wall., 521.

§ 1191. — attachment.—When a judgment of a neighboring state is offered in evidence the inquiry must be made whether the court had jurisdiction over the parties and the subject-matter. The facts which are material to the cause and which appear in the record cannot be contradicted. But there is no objection to pleading facts which go to restrain the effect of the judgment, but which do not contradict in a material part the record. Of this character is a plea showing that the notice was given by attachment of property and could not affect the defendant personally, where the record merely states the fact that notice was served on the defendant. *Lincoln v. Tower*,\* 2 McL., 473.

§ 1192. A judgment in an attachment suit in which the defendant was not personally served and did not appear, though operative upon the property of the defendant within the state, has no validity to charge the defendant outside of the state in which it is rendered, and cannot be sued on outside of such state. *Thompson v. Emmert*,\* 4 McL., 96.

§ 1193. A judgment against the principal debtor, in a foreign attachment in Pennsylvania, is not evidence, in the District of Columbia, of a debt due by that debtor. *Ricketts v. Henderson*, 2 Cr. C. C., 157.

§ 1194. Appearance without process.—Where proceedings which are authorized and prescribed in suits in equity, against absent defendants, under the laws of Kentucky, are regularly observed, they are held to be absolutely binding within the state; but they could not have a binding effect beyond the jurisdiction of that state, unless those defendants should have been legally and personally served with process, or should have voluntarily submitted themselves as parties. Hence, where a defendant residing in Iowa voluntarily entered his appearance and answered a bill filed in Kentucky, he was held to have waived all objection to the lack of jurisdiction on the ground of non-residence. *Shields v. Thomas*,\* 18 How., 253.

§ 1195. Estoppel by record.—In an action upon the judgment of a court of a sister state, where it appears from the record that the defendant personally appeared in the action, that fact cannot be contradicted by plea. But the judgment has no effect where the record shows that the defendant was not personally served and did not appear. *Thompson v. Emmert*,\* 4 McL., 96.

§ 1196. In a suit upon a judgment, the record of which shows that the defendant appeared by attorney, the defendant can plead in bar that he was not served with process and did not appear in the action or authorize any person to appear for him. *Field v. Gibbs*,\* Pet. C. C., 153.

§ 1197. A judgment was rendered in New York against three members of a firm, after dissolution, two of whom were citizens of New York, and the other a citizen of Pennsylvania. The latter was never served with process nor did he answer, though an attorney at law filed an answer for all the defendants, and the record stated that the defendants had answered by

attorney. In an action in Kansas against the Pennsylvania defendant upon the judgment, it was held that he was not estopped from showing that he was never served with process, and never appeared in the action, and never employed or authorized or assented to the employment of the counsel who filed the answer. *Arnott v. Webb*,\* 1 Dill., 362.

§ 1198. Judgment in a suit brought against a partnership after dissolution is not binding in another state, on one of the members not served with process, though his appearance is entered by another member, when such entry is without his permission; and this is the case though the law of the state where suit is brought authorizes such a judgment. *Hall v. Lanning*, 1 Otto, 160.

§ 1199. Defenses.—The judgment of a state court is conclusive when sued on in the circuit court of the United States in another state, and the merits cannot be examined into for any purpose, not even where the judgment may have been rendered upon an illegal contract. *Dawson v. Daniel*,\* 2 Flip., 801.

§ 1200. Under the constitution and act of congress, a judgment has the same force and effect in every other state as it has in the state where it is pronounced. If in such state it is conclusive of the right decided, it is likewise conclusive in every other. *Green v. Sarmiento*, 3 Wash., 17; *Pet. C. C.*, 74 (*DR. AND CR.*, §§ 9980-32).

§ 1201. A judgment completely extinguishes the contract on which it is rendered, wherever such contract may have been made; and though the contract be made in a foreign country, a discharge of the defendant under the bankruptcy laws of that country subsequent to the rendition of a judgment against him upon the contract in this country is not a bar to an action upon that judgment in another state than the one in which it was rendered. *Ibid.*

§ 1202. A judgment when sued on in another state than that in which it was rendered cannot be assailed on the ground of fraud. *Randolph v. King*,\* 2 Bond, 104.

§ 1203. The judgment of a state court must have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced, and whatever pleas would be good to a suit thereon in such state, and none others, can be pleaded in any other court in the United States. In a suit in the circuit court of the United States for the district of South Carolina, upon a judgment rendered in the state of New York, the plea of *nil debet* is not good. *Hampton v. McConnel*,\* 3 Wheat., 234.

§ 1204. In an action on the judgment of another state, whatever pleas would be good in a suit thereon in such state, and none others, can be pleaded. *Westerwelt v. Lewis*,\* 2 McL., 511.

§ 1205. In an action upon a judgment of a sister state the statute of limitations cannot be pleaded, where process was served upon the defendant personally, or where he appeared in the action. *Moore v. Paxton*,\* Hemp., 51.

§ 1206. In an action upon a judgment rendered in another state by a court having jurisdiction of the case, such judgment, however erroneous, is conclusive upon the parties, unless it shall be reversed or set aside for fraud. And unless to show fraud, if indeed that can be shown collaterally, the evidence on which the judgment was obtained cannot be gone into. *Warburton v. Aken*,\* 1 McL., 460.

§ 1207. Under section 1 of article 4 of the constitution of the United States and the act of congress passed to give it effect, it cannot be pleaded to an action on a judgment of another state that the judgment was obtained by fraud, unless such a plea would be good in the courts of the state where the judgment was rendered. *Barras v. Bidwell*,\* 3 Woods, 5.

§ 1208. In New York the judgment or decree of a court possessing competent jurisdiction is, as a general rule, final not only as to the subject-matter thereby actually determined, but as to every other matter which the parties might litigate in the cause and which they might have had decided. In an action on a judgment in that state it cannot be pleaded that it was obtained by fraud. *Ibid.*

## VII. JUDGMENTS OF STATE COURTS.

§ 1209. Jurisdiction—Review by federal court.—The circuit court of the United States has the same authority to examine into the jurisdiction of the court, when the judgment of a court of the state in which it sits is produced before it, as when the judgment comes from another state. *Galpin v. Page*, 3 Saw., 93.

§ 1210. The courts of the United States will not review the judgment of a state court when the subject-matter is within the jurisdiction of the state court, on the ground that its judgment was irregular and illegal, and contrary to the law of the state. *Adams v. Preston*, 22 How., 473.

§ 1211. The courts of the United States will not revise or correct judgments or decrees of state courts where the jurisdiction of those courts appears in the record. Full faith and credit

must be given to the judicial proceedings and records of the courts of the states. *Amory v. Amory*,\* 12 Am. L. Reg. (N. S.), 38.

§ 1212. The judgment of a state court is only entitled, in the federal courts of the same state, to the same faith and credit as in the courts of another state. *Neff v. Pennoyer*, 8 Saw., 556.

§ 1213. Force of congressional provision as to faith and credit of.—The power of congress to prescribe the effect which shall be given to the judgments of the state courts in the courts of the United States is independent of the constitutional provision as to the credit to be given such judgments in other states. But the act of congress passed to give effect to this constitutional provision gives the same effect to the judgment in the courts of both jurisdictions. *Galpin v. Page*, 3 Saw., 93.

§ 1214. Probate of will conclusive as to its validity.—The courts of probate in Massachusetts have complete jurisdiction over the probate of wills of both real and personal estate, and their decrees are conclusive upon all parties, and not re-examinable in any other court. *Tompkins v. Tompkins*, 1 Story, 547.

§ 1215. *Held*, that the probate of a will by the supreme court of the state of Rhode Island is, under the state laws, final and conclusive upon the validity of the will to pass the real estate in controversy. *Ibid*.

§ 1216. The orphans' court, established by the laws of Pennsylvania, has a general jurisdiction as to intestates' estates, and to direct a sale of real property for the payment of debts; and it is not competent for a United States circuit court to examine the order of that court whilst it remains in force. *Allen v. Lyons*, 2 Wash., 475.

§ 1217. Judgment of parish court binding.—The legality of a judgment of a parish court in Louisiana in the settlement of an insolvency cannot be questioned in the federal courts. *Adams v. Preston*, 22 How., 478.

§ 1218. On commercial questions the courts of the United States are not bound by the decisions of the state courts. *Williams v. Suffolk Ins. Co.*, 3 Sumn., 270.

§ 1219. A judgment in rem under a state law of Ohio permitting proceedings against vessels by name will not be respected by the admiralty courts of the United States where it appears that the owner did not appear and had no opportunity to defend. *The Globe*,\* 13 Law Rep. (3 N. S.), 488.

§ 1220. Judgment as to jurisdiction of military court.—The judgment of a state court that a military court established during the rebellion had jurisdiction will be followed by the supreme court of the United States. *Mechanics' & Traders' Bank v. Union Bank*, 22 Wall., 276.

§ 1221. The judgments of courts of the rebellious states during the rebellion, which simply settled the rights of private persons, and did not tend to defeat the just rights of citizens of the United States, and were not in furtherance of laws to sustain the rebellion, are valid. *Cook v. Oliver*, 1 Woods, 437.

§ 1222. Judgments of courts of rebellious states giving effect to legislation enacted by revolutionary legislatures for the purpose of aiding the rebellion, or which deprived citizens of the United States of their just rights, are void and no subsequent legislation can make them good. They are nullities, and no direct proceeding to set them aside is necessary. So a decree allowing a guardian a credit for Confederate bonds purchased with the funds of his ward pursuant to an act of the insurrectionary legislature is void, as is also a decree in such state affecting the rights of a ward within the federal lines. *Van Epps v. Walsh*, 1 Woods, 598.

§ 1223. Are domestic judgments.—The judgments of a state court are treated as domestic judgments by the federal courts sitting within such state. *Owens v. Gotzian*,\* 4 Dill., 436.

§ 1224. Extraterritorial effect.—No judgment of a state or territory can affect lands beyond the jurisdiction of such state or territory. *Piatt v. Oliver*, 2 McL., 267.

§ 1225. When bar to action in federal court.—Where the judgment of a state court is against the right of a plaintiff to recover damages for an injury received, such a judgment is a bar to an action in a federal court if the facts there proven are materially the same as those established on the trial in the state court. *Hazard v. Chicago, Burlington & Quincy R. Co.*, 1 B.ss., 503.

§ 1226. Service of process.—A judgment rendered against a non-resident without citation or opportunity to be heard is void. *Galpin v. Page*, 18 Wall., 350.

§ 1227. — by publication.—In an action merely personal, where no property is attached, a judgment against a defendant who is not served with process and does not appear will be disregarded in the federal courts, notwithstanding a substituted service by publication under the state law; and a sale of property on an execution on such a judgment will be disregarded. *Pennoyer v. Neff*, 5 Otto, 714.

§ 1228. A judgment in proceedings to charge the property of a non-resident heir for the debts of a deceased person, where service is obtained by publication only, is void as against

such non-resident, unless the statute under which the proceedings were had was strictly followed. *Galpin v. Page*, 18 Wall., 850.

§ 1229. — *contradiction of record as to.*— In an action in a federal court on a judgment rendered in a state court against a non-resident, the defendant may show that process was not served on him personally, though the record states that it was so served. *Knowles v. The Gas-light and Coke Co.*, 19 Wall., 58 (§§ 1137-88). *Contra*, *Logansport Gas Light, etc., Co. v. Knowles*,\* 5 Ch. Leg. N., 230.

### VIII. FOREIGN JUDGMENTS.

**SUMMARY** — *Not a bar to a second suit*, § 1230. — *Extrinsic evidence*, § 1231. — *Cannot be enforced in this country, when*, § 1232. — *Decrees in admiralty*, §§ 1233, 1234.

§ 1230. A foreign judgment does not merge the original cause of action and cannot be pleaded in bar of a second suit on the original cause. *Lyman v. Brown*, §§ 1235-36.

§ 1231. In a suit upon a note, the defendant offered in evidence a judgment rendered in a foreign country in a suit between the same parties on the same note with others, in which judgment was given for the defendant as to the note in controversy. It was held that this being a foreign judgment was only *prima facie* evidence, and that the plaintiff might show by parol that the note in controversy was withdrawn and not submitted to the jury, and that the judgment had been entered by mistake. *Burnham v. Webster*, §§ 1237-40.

§ 1232. The laws of France provide that the father-in-law and mother-in-law must make allowance for the son-in-law if he is in need, so long as a child of a marriage is living. A French citizen married a daughter of citizens of the United States, and, while the latter were temporarily in France, the son-in-law procured in the French courts a decree against them under this law. It was held that an action could not be maintained upon this decree, because this law is local in its operation, framed for the people of France, to regulate their domestic concerns and protect the public against pauperism, and because the decree prescribed a temporary rule of allowance subject to modification, according to the continuing necessity of the plaintiff on the one hand, and the continuing liability of the defendants on the other. *De Brimont v. Penniman*, §§ 1241-43.

§ 1233. The sentence of a foreign court of admiralty and prize *in rem* is in general conclusive, not only as respects the parties in interest, but also for collateral purposes and in collateral suits, not only as to the direct matter of title and property in judgment, but also as to the facts on which the sentence professes to proceed. Nor is there any distinction in this respect between such a sentence and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*. But this proceeds upon the ground that the court pronouncing the decree had jurisdiction over the cause, and that the thing was either positively or constructively in its possession and submitted to its jurisdiction. *Braistreet v. Neptune Insurance Company*, §§ 1244-54.

§ 1234. A decree in admiralty or a decree *in rem* of a municipal court is not conclusive where there is no suitable allegation of the offense in the nature of a libel, and where there is no statement of facts *ex directo* upon which the sentence professes to proceed. *Ibid.*

[NOTES. — See §§ 1255-1279.]

#### LYMAN v. BROWN.

(Circuit Court for Rhode Island: 2 Curtis, 559-562. 1855.)

**STATEMENT OF FACTS.**— Action on bills of exchange, accepted by defendants and indorsed to the plaintiffs. The defendants pleaded that they never promised, etc. The defendants now move for leave to plead, *puis darrein*, that plaintiffs had recovered a judgment against the defendants for the same cause of action, in a court of record of Lower Canada.

§ 1235. *A plea of lis pendens in a foreign jurisdiction, not a good plea in abatement.*

Opinion by CURTIS, J.

The defendant could not have pleaded the *lis pendens* in a foreign jurisdiction, in abatement of this action. *White v. Whitman*, 1 Curtis, 494, and cases there cited; *Lindsay v. Larned*, 17 Mass., 197; *Colt v. Partridge*, 7 Met., 570;



Casey v. Harrison, 2 Dev. (N. C.), 244; Maule v. Murray, 7 T. R., 470; Bayley v. Edwards, 3 Swanst., 703; Foster v. Vassall, 3 Atk., 589; Dillon v. Alvarez, 4 Ves., 357; Salmon v. Wootton, 9 Dana, 423. I am aware that this law has been doubted, and in a few cases such a plea has been said to be sufficient. *Ex parte Balch*, 3 McLean, 221; Hart v. Granger, 1 Conn., 154; Ralyh v. Brown, 3 Watts & Serg., 399.

It seems to me that the ground upon which the plea of a prior suit pending has been held to be sufficient to abate the second suit is not applicable, where the second suit is pending in a foreign country, or even in another state of this Union. That ground I understand to be that the defendant shall not be twice vexed for the same cause of action, where the court can see that in each the remedy is substantially the same. But the court must be able to see that the remedy in each suit is substantially the same. Thus a writ of right is not abated by the pendency of a writ of entry for the same land. Com. Dig., Abatement, H. 24. Nor trespass in C. B. by replevin in the sheriff's court. *White v. Willis*, 2 Wil., 87. Nor an action by assignees of a bankrupt by a prior suit by the bankrupt. *Biggs v. Cox*, 4 B. & C., 920. And where a distinct jurisdiction is sought, whose process, as to person or property, may obtain a satisfaction not within the reach of that in the first suit, how can the court see that the remedy is substantially the same? If a judgment be recovered in one state, the plaintiff may immediately sue upon it in another. He is not bound to show that he has exhausted the means of relief under it, in the state where it was recovered. If he may sue a second time in another state, for the same debt, as soon as a judgment has been recovered, and without taking out an execution, why may he not sue a second time on the original cause of action, before recovering a judgment? It may be said the defendant would be thus compelled twice to defend himself. But where the suits are in different states, one successful defense would be a bar in the other suit; and if one suit is in a foreign country, though perhaps it is not fully settled that a judgment for the defendant on one would be treated as a final bar on the other, yet if it would not, then the defendant may be compelled to defend himself a second time, and this whether both suits are or are not pending at the same time. I have considered this question in this case, because, if it be allowable for a creditor to seek two remedies at the same time in different jurisdictions, and the pendency of the first suit cannot be pleaded in abatement of the second, he ought to be allowed to conduct each of them to a judgment; since it is only by so doing he can make each effectual as a remedy; and where, as in this case, the discretion of the court is appealed to for leave to plead *puis darrein*, the court ought not to use its discretion so as to deprive the creditor of a remedy in this jurisdiction.

But I do not rest my decision on this ground, for I am satisfied I ought not to allow the plea to be filed, because it would not be a defense. What is asked for is leave to plead the Canadian judgment in bar of the action, upon the ground that the recovery of that judgment has merged the original cause of action on the bill of exchange, so that it no longer exists and cannot form a ground for a judgment in this suit. That it can only be pleaded in bar, and, if a good plea, is so, as showing a merger, is clear. *Bank of United States v. Merchants' Bank of Baltimore*, 7 Gill, 415; *Marsh v. Pier*, 4 Rawle, 273.

§ 1236. *A foreign judgment does not operate as a merger of the original cause of action, and cannot be pleaded in bar.*

There is some uncertainty concerning some of the effects of a foreign judg-

ment. See Story's Conflict of Laws, secs. 603-608; 2 Smith's Lead. Cas., 448, note to Duchess of Kingston's Case; 1 Robinson's Practice, 205; and the most recent case I have met with, where the subject was elaborately examined by the court of king's bench, *The Bank of Australasia v. Nias*, 4 Eng. L. & E., 252. But there is none as to this particular. It does not operate as a merger of the original cause of action. *Hall v. Odber*, 11 East, 124; *Smith v. Nichols*, 5 Bing. N. C., 208; *Harris v. Saunders*, 4 B. & C., 411. The fact that *assumpsit* lies on a foreign judgment is decisive that the demand has not passed into a security of a higher nature, so as to operate as a technical merger. *Taylor v. Bryden*, 8 Johns., 173, and the more recent cases, in which it has been held that a judgment in a state of the Union merges the original cause of action, and that consequently *assumpsit* will not lie, rest exclusively on the effect of the constitution and laws of the United States, and admit the distinction as to merger between these and foreign judgments. *Andrews v. Montgomery*, 19 Johns., 162; *Boston In. R. Factory v. Hoit*, 14 Vt., 92; *Napier v. Gedere*, 1 Speers, Eq. R., 215; *Colt's Estate*, 4 Watts & Serg., 314.

The result is that this plea of a foreign judgment, recovered during the pendency of this action, would not be a bar, and the motion for leave to file it must be denied.

#### BURNHAM v. WEBSTER.

(Circuit Court for Maine: 1 Woodbury & Minot, 172-181. 1846.)

STATEMENT OF FACTS.—Action on a note. Defendant gave in evidence that in New Brunswick suit had been brought on the note, and judgment had been rendered for defendant. The plaintiff proposed to prove by witnesses that in the New Brunswick suit the note in question had been withdrawn, and that the judgment had been entered by mistake.

Opinion by WOODBURY, J.

It has been contended by the counsel for the plaintiff in this case, that the record from New Brunswick does not contain enough to show that a judgment was actually rendered there against the plaintiff on the note now in suit. But according to the best forms of judgments, what is stated here is a substantial portion of them, where they are rendered as to part for the plaintiff, and as to another part for the defendant; and it contains enough to cover the decision. Thus in *Toppender v. Fowler*, 2 Lilly's Entries, 475, that part of the judgment in favor of the defendant is merely — "It is also considered that the said John Toppender, etc., be in mercy for their false plea against the said John Fowler, etc., as to the trespass aforesaid, whereof the said John Fowler, etc., are above in form aforesaid acquitted; and the same John Fowler, etc., do go thereof without day." So page 508 of the same book in the case of *Dummer & Fitch*.

§ 1237. *Domestic judgments between same parties are conclusive.*

The next question then is, whether the judgment so rendered in this record for the defendant can be disproved or invalidated by parol evidence so as to reopen any part of it for further consideration. The distinctions on this subject are several in number; and some of them are well settled, while others are much controverted.

*Firstly.* It is an elementary principle that a *domestic* judgment, that is, one under the same government, if between the same parties and on the same point, is conclusive, and cannot be avoided or reopened by parol evidence.

When open to a writ of error, or appeal, or review, or new trial, those modes of relief can be pursued, and the judgment in those ways changed for certain causes which need not be specified, and on parol evidence often in each of them, except in a writ of error. 2 N. H., 65, 128.

But when such a judgment is sued in an action of debt, or is pleaded in bar, or is offered in evidence as a defense under the general issue, it is, as a general rule, conclusive, and not open to be impugned in another hearing by the testimony of witnesses on account of what Lord Coke calls "the absolute verity of the record." *Cheshire Bank v. Robinson*, 2 N. H., 126, 128; *Snow v. Prescott*, 12 id., 535; *Tilton v. Gordon*, 1 id., 33; 9 John., 233; 4 Wheat., 215; 1 id., 7. The various exceptions in such cases growing out of the want of jurisdiction in the court rendering the judgment, or of fraud in procuring it, or of the parties and point being in some respects different, need not be considered here, as the present is not the case of a *domestic* judgment, nor are any of those exceptions relied on. *Robinson v. Crowninshield*, 1 N. H., 76; *Farmer v. Stewart*, 2 id., 97.

§ 1238. *Force and effect in one state of judgments rendered in another.*

*Secondly.* Judgments rendered between the same parties and on the same point in one of the United States, though foreign for most purposes, and not to be treated on general principles as domestic judgments (Story, *Conf. of L.*, §§ 501, 599), are provided for by the constitution (article 4, section 1). "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." This is almost a copy of a previous provision in the articles of confederation (article 4). It was proposed under the old articles of confederation to make such judgments conclusive, but the motion was rejected. 1 Secret Journal of Cong., 346.

It has happened, however, since, that the tendency of the decisions has been to place that construction on the clause as it now stands. And the better opinion seems to be, that by force of this clause all courts in the United States are bound to give their proper effect to the judgments rendered in other states of the Union, as fully as if they had been domestic judgments. 2 McLean, 129, 476; *Thurber v. Blackbourne*, 1 N. H., 242; 19 John., 162; 15 id., 121; *Hampton v. McConnel*, 3 Wheat., 234, and note; *Mills v. Duryee*, 7 Cranch, 481, 486; *Armstrong v. Carson*, 2 Dall., 302. But however that may be, it is not material here for a guide, as in this case the judgment offered was not rendered in one of the states of this Union, but in an adjoining British province.

It is then open to all the objections and proofs which are applicable to any *foreign* judgment. In relation to foreign judgments, some cases maintain that they are in all respects to be treated as domestic judgments, while others insist on various exceptions or qualifications, and among them one broad enough to render the parol evidence competent which was offered in the present case.

§ 1239. *A foreign judgment is prima facie evidence of what it purports to decide.*

My own impressions in relation to foreign judgments are these: They do, like domestic ones, operate conclusively, *ex proprio vigore*, within the governments in which they are rendered, but not elsewhere. When offered and considered elsewhere, they are, *ex comitate*, treated with respect, according to the nature of the judgment and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judg-

ments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract, and hence to be respected elsewhere by analogy according to the *lex loci contractus*.

With these views I would go to the whole extent of the cases decided by Lord Mansfield and Buller; and where the foreign judgment is not *in rem*, as it is in admiralty, having the subject-matter before the court, and acting on that rather than the parties, I would consider it only *prima facie* evidence as between the parties to it. *Sinclair v. Fraser*, Dougl., 5, note; *Walker v. Witter*, id., 1; *Hall v. Odber*, 11 East, 118.

And though it would, in my view, have been safer to hold the same doctrine in admiralty decisions, yet the precedents are very strong in favor of their being conclusive. But other decisions of foreign courts on property, where the property is without their jurisdiction, do not bind it, though the parties themselves were before the court. 2 Conn., 627; Story, Conf. L., sec. 552; 2 Rawle, 431; 2 Paige, 402; 1 Dowl. & Ry., 35. This is the case especially as to real estate, and it was settled in respect to the property of a testator, whether real or personal, which was situated abroad in another government, though the testator was domiciled where the action was brought. *Aspden v. Nixon*, 4 How., 467 (Est. of Dec., §§ 99, 100). As it is not necessary to decide in respect to judgments *in rem*, for the purpose of disposing of this case, I will not go into all the considerations which are so strong against their uncontrollable validity, where rendered by courts or in countries extending no reciprocal courtesy to us, and where, as in Algiers or Turkey, the law of nations is as little understood as it is respected. Indeed, in some cases, exceptions like this last seem to have been applied to them. *Sawyer v. Maine F. & M. Ins. Co.*, 12 Mass., 291. But the general rule is the other way. Holding, however, in personal actions, that the foreign judgment is only *prima facie* binding, we violate no settled principle, and, in respect to precedents, we go back to a golden age of the law, and retrace our steps here, as has been done in England, from some unwise departures from the ruling on this subject in that age. See for this rule, beside the cases before cited, 1 Camp., 63; 9 East, 192; *Houlditch v. Donegal*, 8 Bligh, 338; 2 Conn., 627; *Taylor v. Bryden*, 8 John., 173; 1 Mass., 401; 8 id., 273; 9 id., 462; 11 id., 265; 4 Cow., 523; 3 Fairf., 94-108; 4 Met., 333, 343; 1 Starkie on Ev., 214, note; Story, Conf. of L., secs. 606, 608; 2 Kent, Com., 118. See against it, *Alivon v. Furnival*, 1 Crompt., Mees. & Ros., 277; *Martin v. Nichols*, 3 Sm., 458, decided in 1830, and 4 Maul. & Selw., 20, and 2 Barn. & Ad., 953, and decided in 1831, but all overruled in 8 Bligh, 341-345.

§ 1240. *Circumstances under which a personal judgment is not conclusive.*

By returning to that rule, we are enabled to give parties, at times, most needed and most substantial relief, such as in judgments abroad against them without notice, or without a hearing on the merits, or by accident or mistake of facts as here, or on rules of evidence and rules of law they never assented to, being foreigners and their contracts made elsewhere, but happening to be traveling through a foreign jurisdiction, and being compelled *in invitum* to litigate there.

Many of these, in my opinion, ought, by special legislation in all states, to be made grounds of relief against the conclusiveness even of a domestic judgment; and I know of few more causes of individual grievance in the present administration of the laws, where such special legislation does not exist, than the controllable character of domestic judgments, which have been finally

rendered, and then bind the parties forever, though one has in truth, by accident or mistake, never been heard, or never had the real merits of his case examined and decided.

Considerations like these, probably, have led courts to get rid of their conclusiveness where possible, as in *Snow v. Prescott*, 12 N. H., 535, treating a payment made, but not indorsed and allowed in a judgment on the debt, not as barred, as in *Tilton v. Gordon*, 1 N. H., 33, but made on a *promise* to indorse, which, not being done, rescinds the promise, and enables the payer afterwards to recover the money back. In case of foreign judgments, we are fortunately enabled, by considering them only *prima facie* right, to let in relief in all suitable cases; and, at the same time, we are enabled, by restricting properly what shall obviate the *prima facie* evidence, to prevent two or three real trials of the same question,—that unnecessary litigation or multiplicity of suits which is the chief argument in favor of making even a domestic judgment conclusive.

Thus, under that rule, I would allow testimony to rebut the *prima facie* evidence, as has often been done, to show first that the court rendering the judgment had no jurisdiction of the case, or gave no notice to the defendant; or that the proceeding was in law irregular. See on this, *Sawyer v. Maine F. & M. Ins. Co.*, 12 Mass., 291; 3 Wils., 303; 9 East, 192; 9 Cranch, 144; 15 John., 121.

In *Rangely v. Webster*, 11 N. H., 299, it was held that a judgment recovered in another state, against a citizen of this, without a personal notice or appearance, is a nullity. *Bissell v. Briggs*, 9 Mass., 462; *Hall v. Williams*, 6 Pick., 232; *Whittier v. Wendell*, 7 N. H., 257; 5 Wend., 148, 161; 13 Wend., 407. There it was held also to be equally void, whether set up as a defense, or sued on. 11 N. H., 299; 7 id., 257, cites, besides above authorities, 4 Cow., 292; 6 Wend., 447; 19 John., 162; 4 Conn., 380; 1 N. H., 242; 3 Mason, 251; 3 Wheat., 235.

Secondly. I would go still further; and that is the matter chiefly questionable and in some degree novel, in respect to adjudged cases, and would allow the opposing party, where a foreign judgment is sued, pleaded or offered in evidence, to rebut its *prima facie* force and obligation, by showing that the merits of the claim, now in controversy, were not in truth at all there considered and adjudged. And I would do that, whether it occurred by accident, or mistake, or any agreement of the parties, or any other excusable cause, as well as when it arose from the want of personal notice.

The authorities nearest in point to support this last view are, in some cases, even of domestic judgments pleaded, and which, though not so extensive in their details as to reach all I propose, go quite as far as is necessary to cover the present case.

Thus, in *Whittemore v. Whittemore*, 2 N. H., 26, 30, it is held that parol proof is admissible in case of general declaration, even on a domestic judgment, to show that the subject-matter of the present suit was not actually litigated and settled there. *Seddon v. Tutop*, 1 Esp., 401; S. C., 6 D. & E., 607; 2 John., 27; *Hale's Com. Law*, 43; 2 N. H., 129. So, if the count or declaration be special, parol proof is admissible to show that the plaintiff held two demands of like character. 2 Chit. Pl., 216, note. See other cases cited in 2 N. H., 30. So, if there be two special counts, parol proof is competent that one was abandoned or withdrawn and not tried, which is the present case.

*Wheeler v. Van Houten*, 12 Johns., 311. See farther, in support of these conclusions, 8 Johns., 173; and *Robinson v. Prescott*, 4 N. H., 450.

How does this stand in reason and principle? Why should we be required from comity only to respect a foreign decision, as on the merits, when in point of fact none was made on the merits? Extend comity to what? Not to the hearing of the merits, for there was no such hearing. Not to the learning or uprightness or wisdom of the foreign bench, for none of these were brought to the disposal of the merits in controversy.

Nor would I permit the *prima facie* force of the foreign judgment to go far, if the court was one of a barbarous or semi-barbarous government, and acting on no established principles of civilized jurisprudence (4 Bligh, 341), and not resorted to willingly by both parties, or both not inhabitants and citizens of the country. Nor can much comity be asked for the judgments of another nation which, like France, pays no respect to those of other countries, except, as before remarked, on the principle of the parties belonging there, or assenting to a trial there. Then the judgment should have a strong force beyond one *prima facie*, as on a full trial there, a voluntary trial, and then bind as a species of contract of a high character perfected abroad, and hence to be governed by the laws there.

On the other hand, by considering a judgment abroad as only *prima facie* valid, I would not allow the plaintiff abroad, who had sought it there, to avoid it, unless for accident or mistake, as here. Because in other respects, having been sought there by him voluntarily, it does not lie in his mouth to complain of it. *Bradstreet v. Neptune Ins. Co.*, 3 Sumn., 600 (§§ 1244-54, *infra*).

Nor would I in any case permit the whole merits of the judgment recovered abroad to be put in evidence as a matter of course, but being *prima facie* correct, the party impugning it and desiring a hearing of its merits must show first, specifically, some objection to the judgment's reaching the merits, and tending to prove they had not been acted on. Or by showing there was no jurisdiction in the court, or no notice, or some accident or mistake or fraud, which prevented a full defense, and has entered into the judgment. Or that the court either did not decide at all on the merits, or was a tribunal not acting in conformity to any set of legal principles, and was not willingly recognized by the party as suitable for adjudicating on the merits.

After matters like these are proved, I can see no danger, but rather great safety in the administration of justice, in permitting to every party before us at least one fair opportunity to have the merits of his case fully considered and one fair adjudication upon them, before he is estopped forever. So, I would allow such evidence as quick when the judgment is offered as a defense as I would when a suit is brought to enforce it. The objection goes to its validity on principle in both instances, and the distinctions introduced by Chief Justice Eyre as to this, in 2 H. Bl., 410, are not now deemed sound. *Story*, Conf. of L., §§ 599, 602; 10 John., 561; 3 Wheat., 246; 2 Pet., 157; 13 La., 437. See also the cases before cited, and especially 11 N. H., 299. Such a fair adjudication, the plaintiff proposes to prove, has not been once had on the note now in suit; and to prove, also, that the contrary appearance of the record in this case has arisen from a mere accident or mistake, in not striking out the counts on the note after the note itself was by agreement withdrawn.

I think he ought to be allowed to offer such evidence. That, and that only, we decide in the present case. In order to give him an opportunity to do that, my opinion is that the verdict should be set aside. *New trial granted.*

DE BRIMONT *v.* PENNIMAN.

(Circuit Court for New York: 10 Blatchford, 436-443. 1873.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—This is an action of debt. The declaration contains two counts. The first is founded on an alleged judgment or decree pronounced in the then empire of France; the other count is debt on simple contract, for interest alleged to be due to the plaintiff, for the forbearance of moneys due and owing by the defendants to the plaintiff. The first count only is demurred to. That count alleges that the plaintiff is an alien and a citizen of the French republic, and that the defendants are citizens of the United States and of the state of New York; that on the 16th of March, 1863, at Paris, in the then empire of France, the plaintiff intermarried with the daughter of the defendants; that a child of the marriage was born, who is still living; and that, on the 7th of February, 1869, such daughter (the wife of the plaintiff) died. The declaration then sets out certain articles of the Code Civil of France, which provide that children must make an allowance to their father and mother, and other ancestors, who are in need; that sons-in-law and daughters-in-law must also, in like circumstances, make an allowance to their fathers-in-law and mothers-in-law, but this obligation ceases, first, when the mother-in-law contracts a new marriage, and, second, when that one of the married couple through whom the relation of affinity exists is dead and the children born of such couple are also dead; that the obligations springing from the foregoing provisions are reciprocal; and that an allowance is only to be granted in proportion to the necessities of him who claims and to the means of him who is bound to pay.

It is next averred that, at and prior to the said intermarriage, and at the time of the rendition of the judgment and decree next mentioned, and subsequently to such decree, the defendants were residents of the empire of France, had the benefit of its laws and owed to it a temporary allegiance; that on the 14th of August, 1869, the civil tribunal (particularly mentioned), at Paris, rendered and pronounced judgment, in an action there pending, wherein the said plaintiff was plaintiff and the said defendants were defendants, brought by the plaintiff, to obtain an allowance from the defendants, under the said articles of the Code Civil, that the defendants, jointly and severally, pay to him 18,000 francs per year, in equal monthly payments, in advance, such payments to be made from the time that such allowance was first demanded, and should be 6,000 francs for the use of said plaintiff and 12,000 francs for the use of the said child of the plaintiff and of said daughter of the defendants; that the defendants were both duly served with process in said action and appeared therein; that the said civil tribunal was a court of the empire of France and had jurisdiction of the subject-matter of the action and of the parties; that the defendants appealed from the said judgment to the court imperial of Paris; that such appeal was there prosecuted by the plaintiff and the defendants, and, on the 5th of May, 1870, such appellate court adjudged and decreed that the before-mentioned judgment be affirmed, in respect of the right of the plaintiff to an allowance, and in respect to the amount, to wit, 18,000 francs per year, and of the appropriation thereof by the plaintiff, to wit, 6,000 francs to the use of the plaintiff and 12,000 thereof to the use of the said child, and in respect of the times and manner in which it should be paid to the plaintiff, to wit, in equal monthly payments, in advance, and did

adjudge and decree that the defendants, jointly and severally, pay to the plaintiff the said sum, and pay the same from the day of the decease of their said daughter, February 7, 1869, as appears, etc., by the records and proceedings of said court, now remaining of record; that the said judgment and decree of the court imperial is final and conclusive, and is in full force, not reversed or annulled or satisfied, etc.; that such court is a court of general jurisdiction, and had jurisdiction of the subject-matter and of the parties; and that the plaintiff has not yet obtained satisfaction of the said judgment, whereby an action hath accrued to him to have and demand of the defendants, jointly and severally, the sum of \$10,200, being the value, in currency of the United States, of the sum of 48,000 francs, in which said last-mentioned sum the defendants are, jointly and severally, indebted to the plaintiff, by reason of the said judgment, for the time beginning the 7th of February, 1869, and ending the 7th of November, 1871.

The defendant James F. Penniman demurs to this count upon various grounds, which I do not think it necessary to enumerate. They were urged on the argument, and, by not noticing many of them further, I am not to be deemed to affirm the sufficiency of the declaration in respect thereto. It is sufficient that the principal question is decided. That question is, whether an action of debt will lie in this court upon such a decree of a court in France, made against citizens of the United States, husband and wife, temporarily resident in that empire.

It may not be irrelevant to state that, besides the articles of the French code inserted in the declaration, the counsel for the plaintiff admitted, on the argument, and he has stated on his brief, that it is provided by other articles of that code that the duty to make the allowance which the decree in question provides ceases whenever the claimant obtains a fortune sufficient for his own support, or the party by whom the payment is to be made becomes unable to pay, or cannot pay without withdrawing means which are required for his own necessities.

The question is novel. No case has been cited by counsel in which a foreign judgment of such a nature has been the subject of an action in this country or in England, and no such case has fallen under my observation. Cases are numerous in which foreign judgments for the recovery of a definite sum of money have been sued upon, and the question has been largely discussed whether such judgments are conclusive or are merely *prima facie* evidence of the debt which they award, and whether, and to what extent, the subject-matter is open to inquiry and proofs on the original merits. Those cases are not controverted by the counsel for the defendant, but they are deemed not to apply to such a decree as is set out in this declaration. Cases are also numerous in which the force and effect of judgments and decrees in the courts of one of the states of the United States are under consideration in the courts of other of the states or in the federal courts. Those cases are not deemed to apply to the present, because the constitution of the United States operates, as between the states, to give them an efficiency not due to a foreign judgment or decree.

In determining the precise question whether, upon the facts stated in the declaration, the plaintiff shows a cause of action, it may not be material to decide whether such a judgment is, in this court, to be regarded as conclusive or only *prima facie* evidence of the indebtedness claimed by the plaintiff; for, if it be either, then, in connection with the allegations showing the law and



the relationship of the parties, a demurrer founded in denial of legal liability could not, probably, be sustained. The cases, therefore, which discuss that distinction need not be considered.

§ 1241. *A suit cannot be maintained in the United States founded on a judgment rendered in a French court against a citizen of the United States, requiring him to pay an annuity to the husband of his deceased daughter.*

The broad question whether a citizen of the United States, whose daughter marries in France, can be prosecuted here upon a decree of a French court requiring him and his wife to pay an annuity for the support of their son-in-law, is prior to the inquiry last above referred to. The subject pertains to the domestic relations of our own citizens and the duties and obligations resulting therefrom, and the decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom the affinity was traced. The nearest analogy to a decree of the nature in question, to which my attention is called, is a decree for alimony where a divorce, total or partial, has been granted; but the only cases in which such a decree has been held to support an action in another jurisdiction are under the influence of the constitution of the United States, and, by force of that constitution, it was held that a suit would lie, in a court of chancery, to compel the performance of the decree. *Barber v. Barber*, 21 How., 582 (COURTS, §§ 903-12).

§ 1242. *Foreign judgments receive no recognition from courts except upon the principle of comity.*

It is not irrelevant to a consideration of the nature of the decree in question to say that it does not proceed upon the rule of obligation recognized by all civilized nations, that the parent shall support his children during minority, which involves, also, the correlative right to the services of those children while thus supported. Such an obligation has no relation to the case under consideration. Whatever obligation or duty lies at the foundation of the claim of this plaintiff is the creature of positive statute, framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils. Statutes in some respects similar are found in England, and in most, if not all, of the states of this country. The duty of parents and grandparents, and reciprocally of children and grandchildren, when of sufficient ability, to provide for the necessary support of those relatives, and prevent their becoming a charge to the public, is declared and is enforced. Such regulations are local in their nature and in their application; and so are the orders for their enforcement. They are a part of a local system to provide for paupers and to relieve the public from their maintenance when they have relatives within certain designated degrees who are of ability to support them. Such orders are subject to modification and adjustment, as circumstances may require, in the states and tribunals wherein they are made.

Apart from questions growing out of the federal constitution, they can only be enforced in the states where they are made. Orders of filiation are of a similar character. They are mainly for the protection of the public, founded on local statutes, and are in the nature of domestic police regulations. The provisions of the code of France, set out in the declaration, and the decree of the courts founded thereon, are of the like nature. It would seem that the policy of that country, as viewed by its courts, does not require that the son-in-law

or other claimant shall himself do anything for his own support, but that he is to be supported in idleness. That is probably not a matter of importance to the present inquiry, except so far as it may tend to show that the judgment or decree is hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burthen of supporting another would be tolerated. The principle upon which foreign judgments receive any recognition in our courts is one of comity. It does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens. The courts of this country will be slow to hold that whenever an American citizen shall visit France and reside there temporarily with his family, his son or his daughter, by a rash or imprudent marriage, can cast upon the parents, mother as well as father, the perpetual burthen of an annuity for the support of the wife or husband. So long as such residence continues, no doubt the parents must submit to the laws of France. The orders of her courts may be enforced against them as those laws may prescribe; but in a matter of this kind those laws must be executed there, and such decrees can have, and ought to have, no extraterritorial significance. They rest upon no principles of universal acceptation, like the obligation of contracts, or the protection of generally recognized private, personal rights. No disposition to deal with foreign judgments so as to promote the ends of justice demands that such decrees should be arbitrarily enforced in our courts.

§ 1243. *Laws of a foreign country which are local in their nature have no extraterritorial operation, and judgments founded upon them will not be enforced in our courts.*

Beyond these considerations, I think it plain upon the face of the declaration; and especially where the other admitted provisions of the French code (stated by the counsel) are brought into view, that the decree itself should be deemed, and would in France itself be deemed, local and provisional, and designed to be carried into effect there, and only upon persons and property found there. Their laws contemplate the supervisory control and direction of their courts over the parties in all the changes which may occur in their relative pecuniary conditions. The decree in question prescribes a temporary rule of allowance and provision for support, subject to modification according to circumstances. There is no award of any sum certain, to be presently paid, and the declaration does not show that any sum whatever could even there be collected without a further application to the court for some process or other award of means by which some definite amount shall be collected. Continuing necessity on the one hand, and continuing ability on the other, are assumed for the future, and the absence of either makes even the decreed allowance to cease. Without assuming to say that the father-in-law and mother-in-law, if still in France, would not have the *onus* of showing that circumstances had changed, and of procuring a modification of the decree thereupon, these observations bear pertinently on the nature of the decree itself, and with great force on the question how such decree is to be treated in our own courts.

In harmony with what has been already suggested, I add that we cannot hold that such decree is final, operative and binding unless and until the defendants go to France and there appeal to the discretion of their courts to modify the decree according to the new circumstances which may arise; and yet the claim here made, in regard to the effect of the decree in our courts, would require us to give judgment in accordance therewith, even though the

defendants offered to prove, and could prove, that the plaintiff had come to a princely inheritance.

Without, therefore, considering the other alleged imperfections in the declaration, or the peculiarity of a decree which charges the wife of the demurrant personally, or the want of any averment that she has any separate estate which can be charged by this court, I am of opinion that the defendant James F. Penniman is entitled to judgment upon his demurrer.

**BRADSTREET v. NEPTUNE INSURANCE COMPANY.**

(Circuit Court for Massachusetts: 3 Sumner, 600-617. 1889.)

Opinion by STORY, J.

**STATEMENT OF FACTS.**—This is the case of an action on a policy of insurance underwritten by the Neptune Insurance Company “for \$3,000 on the schooner Gardiner of Gardiner, at sea or in port, for and during the term of one year, commencing the risk on the 28th day of September, 1836, at noon.” There is a clause in the policy as follows: “It is agreed that the insurers shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war. But the judgment of a foreign consular or colonial court shall not be conclusive upon the parties, as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the law of nations.” The declaration alleges a loss by seizure of the government of Mexico during the term for which the schooner was insured. The statement of facts, upon which the cause has been argued, admits the seizure; and the defendants contend that the seizure and the subsequent condemnation of the schooner were on account of a violation of the revenue laws of Mexico. And to establish this defense, they produce an authenticated transcript of the proceedings of the Mexican court against the vessel, and of the decree of condemnation. The plaintiffs deny the existence of any such alleged laws of Mexico, or that any breach thereof was committed, or that the court passing the decree had any jurisdiction; and they insist that the vessel was confiscated and condemned arbitrarily and unjustly, and without any trial, or any opportunity on the part of the master to make any defense or to examine any witnesses.

The questions submitted to the court are: First. Whether the record of the proceedings is conclusive as to the existence of the laws of Mexico, the jurisdiction of the court, and the cause of seizure and condemnation; so that the plaintiffs are estopped from controverting them, and showing that there has been no violation of the revenue laws of Mexico? Secondly. Can the plaintiffs by law traverse the allegations of the record, that the master of the vessel was summoned to appear and defend his rights, and that the condemnation took place after he had appeared in court and been heard? And if by law they can traverse these allegations, then is the record still sufficiently conclusive to establish that the seizure was such as will discharge the underwriters?

Supposing the proceedings before the Mexican tribunal to be in all respects unexceptionable, my opinion is, that the allegations in those proceedings, as to the appearance of the master before the court, and his being heard before the decree of condemnation, would be conclusive on the parties, and would not be traversable or re-examinable in the present cause. But if the defense be that the proceedings were not merely irregular and illegal, but were founded

in a positive fraud; and that, in point of fact, the whole record was but a tissue of false accusations and false statements and false proofs, made up to cover the fraud in which the seizing and prosecuting parties were all confederate, I should think that evidence was admissible to show that the master never was summoned, never did appear, and never was heard before the condemnation, in order to establish *pro tanto* the fraud. I know of no case where fraud, if established by competent proofs, is not sufficient to overthrow any judgment or decree, however solemn may be its form and promulgation. But it would require the strongest evidence to establish such a defense, by testimony not only of the highest order, but also free from any, the slightest, suspicion of interest or bias.

But to pass to the consideration of the first point made at the bar. I do not meddle with the question what is or ought to be the effect of a foreign sentence *in personam*; for that may be thought to be governed by some considerations not applicable to proceedings *in rem*. See among other cases, *Hounditch v. Donegal*, 8 Bligh, 301.

§ 1244. *The sentence of foreign courts of admiralty conclusive.*

That the sentence of a foreign court of admiralty and prize *in rem* is in general conclusive, not only in respect to the parties in interest, but also for collateral purposes and in collateral suits, not only as to the direct matter of title and property in judgment, but also as to the facts on which the sentence professes to proceed, although formerly subject to much doubt and controversy, is now a point fully established in the courts of England and the courts of the United States. It is sufficient on this subject to refer to the cases of *Croudou v. Leonard*, 4 Cranch, 434; *Rose v. Himely*, 4 Cranch, 241; and *Hudson v. Guestier*, 4 Cranch, 281.

§ 1245. *No distinction between a sentence by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding in rem.*

It does not strike me that any sound distinction can be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*. In each case the sentence is conclusive as to the title and property, and it seems to me that it must be equally conclusive as to the facts on which the sentence professes to be founded. This, I think, is the settled doctrine in England and in the courts of the United States. It is a just result from the whole reasoning in *Rose v. Himely*, 4 Cranch, 241; *The Mary*, 9 Cranch, 126, 142 to 146; and *Gelston v. Hoyt*, 3 Wheat., 246.

§ 1246. — *the court pronouncing the decree must have jurisdiction of the cause, etc.*

Such is the general rule. But still it proceeds upon the ground that the court pronouncing the decree had jurisdiction over the cause, and that the thing was either positively or constructively in its possession, and submitted to its jurisdiction. Even in cases of prize, if the vessel has never been captured at all, or if after capture she is rescued or recaptured, so that she is no longer under the dominion or possession of the captors, the sentence of a court of prize, professing to condemn her, would be a mere nullity. In respect to municipal seizures, the same rule must apply. The property must either be seized or be brought within the territorial jurisdiction, or at all events must be in the possession or under the control of the seizers, so as to be positively or constructively subjected to the dominion of the seizing sovereign, and his tribunals;

otherwise the sentence pronounced will be a mere nullity, founded in usurpation.

§ 1247. *As respects prize courts acting in rem, the courts of other nations are competent of themselves to ascertain whether there has been any excess of jurisdiction.*

In respect to the jurisdiction of courts of prize acting *in rem*, as they are courts sitting under the law of nations, the courts of other nations are competent of themselves to inquire into and ascertain whether there has been any excess of jurisdiction, or not, without any resort to the laws of the particular country where the tribunal is established.

§ 1248. — *but the judgments of municipal courts acting in rem must be conclusive.*

But in respect to municipal courts acting *in rem*, but deriving their authority solely from the territorial laws of the sovereign, they are and must, from the nature of the case, be presumed to be the best judges of the nature and extent of their own jurisdiction, and of its just and legitimate exercise. Their judgment, therefore, affirming that jurisdiction must ordinarily be conclusive upon all foreign tribunals, subject, however, to this reserve, that the *res* is either within the territory, or is positively or constructively in the possession of the sovereign or his officers, so that the jurisdiction can, according to the law of nations, rightfully attach in such tribunals. I say ordinarily conclusive, because no foreign court can be permitted to sit as a court of errors to revise the decisions of municipal courts in the exercise of the jurisdiction conferred on them by the municipal laws. That would be to assume the final interpretation of those laws. But this doctrine again must be understood with its proper limitations, that the tribunal is recognized by the sovereign of the country as competent to act in the premises; which competency may be conclusively established from the express recognition of the sovereign, or his silent acquiescence in its decrees.

§ 1249. — *there must be some statement of a charge for which a seizure is made.*

There is another element which, it seems to me, constitutes an essential ingredient in every case, where the sentence of a foreign court *in rem* is sought to be held conclusive as to the title to the property, and as to the facts upon which it professes to be founded. That element is that there have been proper judicial proceedings upon which to found the decree; by which I mean, not that there should be regular proceedings according to the forms of our law, or even of the foreign law, but that there should be some certain written allegation of the offense, or statement of the charge, for which the seizure is made, and upon which the forfeiture is sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, may know what is the offense with which they are charged, and may have an opportunity to defend themselves, and to disprove the charge. It is a rule, founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charge on which the condemnation is sought shall be specific, determinate and clear.

§ 1250. — *there must be some public notice of the proceeding.*

If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing

and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more in common sense and common honesty than the sentence of the tribunal which first punishes and then hears the party,—*Castigatque, auditque*. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law; and it is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding.

§ 1251. — *there must appear upon the face of the record that some specific charge had been drawn up, and that due notice of the proceeding had been given either personally or by some public proclamation, some monition acting in rem to the parties in interest.*

I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem* that some specific offense is charged, for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification or monition, acting *in rem*, or attaching to the thing, so that the parties in interest may appear and make defense, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs.

The opinion of Lord Ellenborough in *Buchanan v. Rucker*, 9 East, 192, contains much doctrine applicable to cases of this sort, although that case was a proceeding *in personam*, against a person who had never been within the jurisdiction. But the case of *Sawyer v. The Maine F. & M. Insurance Company*, 12 Mass., 291, 295, is directly in point. The supreme court of Massachusetts there held that as it did not appear that any libel was filed, any monition issued, any hearing had, or that any of the formalities had taken place which are necessary to give a conclusive operation to the decrees of foreign courts, the sentence in that case (by a court of admiralty) was not to be deemed conclusive, even if it were admitted to be any evidence at all. The court added, that, for aught that appeared from the copy of the proceedings, the forfeiture was decreed by mere arbitrary power, without any trial; and that some of the forms of justice, used in civilized countries, had been assumed without any regard to the substantial requisites of a judicial inquiry.

I entirely agree to the doctrine here promulgated. If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice. If they choose to proceed without any written charges of the offense (for that is what I understand to have been meant by the supreme court of Massachusetts in using the word "libel" in the case above cited), without any monition *in rem*, or notice to the parties, or those who represent them, without any hearing upon the facts, and without giving the party an opportunity to contest the charges, or to know in what particular those charges are, it is but just, and conformable to the rights of other independent nations, to disregard such sentences, as mere mockeries, and as in no just sense judicial pro-

ceedings. Such sentences ought to be deemed, both *ex directo in rem*, and collaterally to be mere arbitrary edicts or substantial frauds.

Similar principles were recognized and maintained by the supreme court of the United States in *The Mary*, 9 Cranch, 126, 142, 144. The court there said that the reason why the whole world are ordinarily held to be bound by the decree of a court of admiralty *in rem* is because every person having any interest in it may make himself a party and appeal from the decree. But the court added: "Notice of the controversy is necessary in order to become a party; and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, express or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all who have an interest in the thing, and is reasonable, because it is necessary, and because it is the part of common prudence for all those who have an interest in it to guard that interest by persons who are in a situation to protect it."

Let us now see how far these principles have any just application to the present case. In the first place, it is perfectly clear that the tribunals of Mexico, having jurisdiction *in rem*, had a complete jurisdiction in this case; for the schooner was at the time within the territorial districts of that government. In the next place, the jurisdiction of the particular court being dependent upon the municipal law, and affirmed by the court itself, would seem to be conclusive upon all foreign courts, especially as the record furnishes evidence that its decree in this very case was adopted by the government through its proper officials. In the next place it is stated in the record that the master of the vessel was summoned (and he was the proper representative of the vessel in a proceeding *in rem* in the absence of the owner), and that he appeared, and was admitted to make defense before the court. So far there seems no difficulty in the case.

The real difficulty in the case is the total want of any libel, or allegation in the nature of a libel, containing specific charges of the offense for which the confiscation was sought. We do not know precisely whether the offense intended to be charged was a fraudulent importation of goods in the schooner contrary to law, or the want of some general manifests, the nature and objects of which were stated, or the want of a specific manifest of the two boxes of medicines, containing a full description of the particular contents of these two boxes. In this respect we are left to mere inference and conjecture. The only documents which contain any statements on the subject, to serve in the place of a libel, are a letter under date of the 18th of April, 1837, from the commissioner of the custom-house, addressed to the administrator of the custom-house in the department, in which the writer says: "I annex three particular manifests belonging to two boxes medicines [no copies of these manifests were put in the record], which arrived in the American schooner Gardiner, Captain E. B. Freeman, coming from New York in ballast, and consigned to Don Pedro Nuel Pailleb. The general manifest I do not send, on account of the said captain's alleging that he is entirely ignorant of the contents of the said boxes, for which reason he makes none, although they have been repeatedly demanded of him in presence of the collector, and also of the commander of the line, that in case this defect is proved, it may not be said to be from want of notice or from any bad faith on the part of the commissioner. I send you, therefore,

the only documents he has delivered to me. The said boxes remain on board the said vessel under thirteen seals for security, until the administration determine what shall be done with them; since there is no occasion for the vessel to proceed to the capital, the captain having written to the consignee to attend there, and see what is to be done in the business. I annex another document, attested by the Mexican consul, that the vessel had been cleared with the customary formalities of the port, together with a rate of the provisions, and a declaration of the said captain, but without a certificate of the measurement of said vessel, the captain of the port not having measured, which, however, shall be forwarded to you as soon as done. All which I make known to you, to serve as occasion may require."

This is the whole of the letter. It is a mere official letter addressed by one public officer to another. It contains a mere narrative of certain facts. It makes no charge whatever against the vessel, as being forfeited by any act or omission. It alludes to no seizure and proceedings against the vessel. It is mere advice; and can in no just sense be deemed a libel, or document in the nature of a libel. It wants not merely the form of a judicial proceeding for a forfeiture, but its very essence. Looking at this letter alone, no person could ever conjecture that the facts stated therein authorized, if true, a forfeiture of the vessel, and were so charged in order to enforce the forfeiture.

The next document is a letter addressed by the administrator of the custom-house to the district judge of the department, under date of the 21st of April, 1837, in which he says: "I have just received from the commissioner of the custom-house at the principal bar a communication under date of the 18th instant [the foregoing letter], which I annex, respecting the want of general manifests with which the American schooner Gardiner, Captain B. Freeman, coming from New York, has arrived at that port, presuming that the other documents, which he has brought, and which I have before me, are in due form of law. All which I communicate to you, that you may determine what seems to you fit of right." This is the whole letter. It contains no accusation, asserts no offense chargeable upon the vessel, and asks no forfeiture.

These are the only papers upon which the district judge proceeded to summon the captain to appear before him to defend his rights. I think it would violate all notions of the administration of public justice to call them a libel, or an allegation in the nature of a libel, or an accusation on which to found a decree of forfeiture against the vessel.

The record then goes on to state the summons and appearance of the captain and the proceedings before the judge as follows: "In virtue of the foregoing order, appeared at the appointed hour before this tribunal, the administrator of the custom-house, attorney-general, and the captain of the American schooner Gardiner, to attend the hearing thereby ordered; and the present proceedings being read, and the judge having explained the object of this hearing, which was made known to the said captain through his interpreter, Don Andreas Mandilas, the said captain represented that on his arrival at Frontera he delivered to the commissioner of this custom-house, Don Juan Rosalind Vega, three particular invoices, a note of the provisions of his vessel, and a clearance of the custom-house of the port whence he sailed, but did not deliver the general manifests, not having brought them on account of being ignorant of the contents of the two boxes he had on board. And the said documents having been exhibited to him for recognition, he said they were the same he



had mentioned. The administrator and attorney-general represented that the captain, being convicted by his own confession of having brought the aforementioned boxes without the requisite manifest, conformable to the laws relating to the matter, they demanded that the penalty be imposed upon him which those laws prescribed for those who do not submit to them; and which being heard by the judge, he said that, in conformity to the demands of the aforesaid functionaries, and to what is prescribed in article 7th of the law of November 16, 1827, and the decree of March 31, 1821, he must and did declare subject to the penalty of confiscation the American schooner Gardiner with all her appurtenances, ordering, in consequence, that the said schooner be brought to this capital, where, after an appraisement notice to the supreme government, agreeably to the final disposal in such case, communicated under date of May 7, they should proceed to a sale at public auction, provided no appeal be interposed within the legal term to prevent. Whereupon the session was concluded, the present being signed by all in presence of the judge and notary, which I certify." It farther appears by the record that the captain refused to sign the foregoing sentence, declaring that he would not condemn himself. No appeal was interposed; and the execution of the sentence was subsequently directed to be carried into effect.

Now, certainly, the sentence does purport on its face to decree a confiscation of the schooner, and to be pronounced in conformity to what is prescribed in certain municipal laws of the government referred to by their dates. But these laws are not set forth *in hæc verba*, so that we are utterly ignorant of their contents. What the particular facts or grounds of the confiscation were is not stated by the judge in the sentence, although certain facts and grounds are stated in the demand of confiscation made in the representation (apparently oral) of the attorney-general and the public administrator, viz., that the two boxes were by the confession of the captain brought into port without the requisite manifests, and therefore were subject to the penalty prescribed by the laws; and hence it may be inferred, *arguendo*, that the judge adopted their statements, and pronounced his sentence upon that foundation.

§ 1252. *In construing the sentence of a foreign court the courts of this country are not bound to make out facts and grounds by argument and inference and conjecture.*

But it is not so said. And I do not understand that, in construing a foreign sentence, which is to be held conclusive *in rem* as to the facts and grounds of the sentence stated therein, this court is bound to make out such facts and grounds by argument, and inference, and conjecture. The facts and grounds ought to appear *ex directo*, in order to estop the parties in interest from denying or questioning them. I agree with the doctrine of Lord Ellenborough in *Fisher v. Ogle*, 1 Camp., 418, that courts of justice are not bound to fish out a meaning, when sentences of this sort are produced before them. Whatever points the sentence professes *ex directo* to decide, they are bound to respect, and admit to be conclusive. But if the sentence be ambiguous or indeterminate as to the facts on which it proceeds, or as to the direct grounds of condemnation, the sentence ought not to be held conclusive; or the courts of other countries put to the task of picking out the threads of argument, or of reasoning or of recital, in order to weave them together, so as to give force or consistency or validity to the sentence. The doctrine in *Calvert v. Bovill*, 7 Term R., 523, and *Christie v. Secretan*, 8 Term R., 192, seems to me on this point entirely correct and satisfactory. In *Maley v. Shattuck*, 3 Cranch, 458,

488, it was said by Mr. Chief Justice Marshall, in delivering the opinion of the court, that the sentence of a foreign court of admiralty has never been supposed to evidence more than its own correctness; and consequently has never been supposed to establish any particular fact, without which the sentence may have been rightly pronounced. The same rule applies to the decrees of municipal courts, where the decree is general, and does not profess to proceed *ex directo*, on any particular facts stated in the decree.

§ 1253. *The record produced by defendants not such as can be considered conclusive evidence against plaintiffs in the present suit.*

On the whole, therefore, for the reasons already stated, I strongly incline to hold, that for the want of some suitable allegation of the offense, in the nature of a libel, and for the want of any statement of facts *ex directo*, upon which the present sentence professes to be founded, it is not conclusive evidence against the plaintiffs in the present suit.

§ 1254. *As to the excepting clause in the policy of insurance.*

But it does not appear to me necessary to rest the decision in the present case wholly on this ground. There is a clause in the policy, that "the insurers shall not be answerable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." The question of the true interpretation of this clause came before the supreme court of the United States in the case of *Carrington v. Merchants' Ins. Co.*, 8 Pet., 496, 516, 517, 518. It was there held, that to bring a case within the clause, as an exception to the liability of the insurers, it is not necessary that there should be a legal or justifiable cause of condemnation; but that it is sufficient that there is a legal or justifiable cause of seizure and detention for or on account of a supposed illicit or prohibited trade. If, therefore, there was a seizure or detention *bona fide* made upon a reasonable ground, such, for example, as if there was a well-founded suspicion of such illicit or prohibited trade, or probable cause to impute or to justify further proceedings and inquiries, that would be a legal and justifiable cause of seizure and detention within the purview of the clause. On the other hand, if there was a mere lawless seizure or detention under the pretext of illicit or prohibited trade, and it was utterly unfounded, and without any reasonable cause of suspicion, and was used merely as a pretense to cover an intentional fraud or tort, then the seizure or detention was not such as was contemplated in the clause.

That there was a seizure in this case admits of no doubt; for there was a proceeding *in rem*, whether regular or irregular is of no consequence, and a confiscation adjudged *in rem*. The property was within the territory, in the possession and under the control of the government officers. Physical force actually applied is not indispensable to constitute a seizure or detention. It is sufficient if the property be potentially within the reach and subject to the process of the government. Thus, an embargo laid on vessels in a port is not less real, as an arrest, seizure or detention, because it is unaccompanied with a physical force put on board to prevent a departure from the port. The restraint may be, and is, just as operative, if there is a moral force and power of immediate action which subdues resistance. There is a complete subjection or *deditio* to the local sovereignty, when it has the means and capacity and will immediately at hand to enforce obedience to its orders.

The seizure and detention were also, as it appears to me, clearly and avowedly made for and on account of a supposed illicit or prohibited trade; that is to

say, a trade carried on, or attempted to be carried on, without the proper documents or manifests required by law. No other cause is assigned or pretended. I do not say that there was any just ground of condemnation. It is sufficient if there was a just and reasonable ground for the proceedings on account of the supposed illicit or prohibited trade. The only question, then, open for consideration, is whether the accusation of the asserted illicit or prohibited trade was a mere cover and fraudulent pretense for a wanton trespass and aggravated wrong in known violation of law and right, or was *bona fide* made, however unfounded in fact. If the latter, the insurers are exonerated; if the former, then they are liable for the loss. In short the question comes to this, whether the whole proceedings were knowingly and intentionally fraudulent, without any reasonable suspicions to justify them. If the condemnation was without any hearing, or opportunity of hearing, on the part of the captain before the court, every presumption of *mala fides* must be materially strengthened.

It appears to me that the question of fraud, or not, is completely open as a matter of fact for the consideration of a jury under all the circumstances of this extraordinary case. Before that question can be properly disposed of, it will probably be found necessary, in addition to other evidence, to have the Mexican laws, on which the condemnation is supposed to have been founded, before the court, so that the point of probable cause of seizure for defect of the proper manifests may be more fully presented, in explanation of the *res gestæ*, to repel or confirm the suggestion of fraud.

*Trial by jury ordered.*

§ 1255. **Jurisdiction.**—Where the question whether the government of Buenos Ayres had sovereign jurisdiction over the Falkland Islands or not was in dispute between the United States and Buenos Ayres, and the United States maintained the negative, it was held that the American courts were bound by the acts of their own government; and that consequently a condemnation of an American ship by a Buenos Ayrean tribunal, for illicit trade with the Falkland Islands, was illegal and void for want of jurisdiction. *Williams v. Suffolk Ins. Co.*, 8 Sumn., 270.

§ 1256. The judicial acts of one nation are to be respected by another, and are conclusive on the subjects of the other relative to all matters within the national jurisdiction. But in order to render them conclusive it is further necessary that they should be matters cognizable by the court, and fairly decided. *Jones v. Walker*, 2 Paine, 638.

§ 1257. If a claim be set up under the sentence of condemnation of a foreign court, the United States supreme court will examine into the jurisdiction of such court; and if that court cannot, consistently with the law of nations, exercise the jurisdiction which it has assumed, its sentence is to be disregarded; but of their own jurisdiction, so far as it depends upon municipal laws, the courts of every country are the exclusive judges. Every sentence of condemnation by a court of competent jurisdiction is conclusive as to the title to the thing claimed under it. *Rose v. Himely*, 4 Cr., 241.

§ 1258. — **service of process.**—A judgment recovered in the court of common pleas at Westminster Hall in Great Britain, without any service of process on the defendant, or any other notice of the suit except personal notice served in the United States, is wholly without jurisdiction of the person; and, whatever force it may have in England, by virtue of statute law, against property of the defendant situated there, it can have no validity here, even of a *prima facie* character. *Bischoff v. Wethered*,\* 9 Wall., 812.

§ 1259. — **allegation of.**—A plea of a foreign judgment must contain an allegation that the court had jurisdiction, or so much of the proceedings must be spread on the record as will show affirmatively that the court had jurisdiction. *Burnham v. Webster*, Dav., 236.

§ 1260. The English courts regard no foreign judgment as conclusive between the parties, unless it is of a form to render it so, if obtained in one of their own courts. *Whitaker v. Bramson*, 2 Paine, 209 (§§ 12-20).

§ 1261. **Proof of record.**—It is not necessary in an action on a foreign judgment to set forth the record or show how the court proceeded. *Martin v. Moore*,\* 1 Wyom. T'y, 22.

§ 1262. **Authentication.**—Foreign judgments are authenticated (1) by an exemplification under the great seal; (2) by a copy proved to be a true copy; (3) by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. *Church v. Hubbard*, 2 Cr., 187.

§ 1263. **Nul tiel record.**—A foreign judgment is not considered as a record, and a plea to such judgment of *nul tiel record* is bad. The opposite party may treat the plea as a nullity and take judgment. *Burnham v. Webster*, Dav., 236.

§ 1264. **Foreign decrees in admiralty.**—A sentence of a foreign tribunal condemning neutral property, under an edict unjust in itself, contrary to the law of nations and in violation of neutral rights, and which has been so declared by the legislature and executive departments of the government of the United States, changes the property of the thing condemned. *Williams v. Armroyd*, 7 Cr., 428.

§ 1265. The sentence of a foreign court of admiralty, condemning a vessel for breach of the blockade, is conclusive evidence of that fact in an action on the policy of insurance. *Croudson v. Leonard*, 4 Cr., 434.

§ 1266. A foreign sentence of condemnation as a good prize is not conclusive evidence that the legal title to the property was not in a subject of a neutral nation. Such sentences are only conclusive evidence of their own correctness, and leave the title of the property condemned open to investigation. *Maley v. Shattuck*, 3 Cr., 453.

§ 1267. In an action upon a policy on property warranted neutral, "proof of which to be required in the United States only," a sentence of condemnation in a foreign court of admiralty, upon the ground of breach of blockade, is not conclusive evidence of a violation of the warranty. *The Maryland Ins. Co. v. Woods*, 6 Cr., 29.

§ 1268. The sentence and proceedings of a foreign court of vice-admiralty, condemning the goods as enemy property, are not conclusive evidence of that fact in a suit upon a policy of insurance. But it is competent and *prima facie*, although not in itself sufficient evidence to prove the fact. *Lambert v. Smith*, 1 Cr. C. C., 361.

§ 1269. The sentence of a foreign admiralty court *in rem* is conclusive except in case of fraud. *Magoun v. New England Marine Ins. Co.*, \* 3 Law Rep., 127.

§ 1270. A decree in the high court of admiralty in England in a collision case, though satisfied, is not a bar to a suit by the owner of the injured vessel against an insurer to recover the damages caused by the collision. The decree is *res inter alios*, and is admissible only to show satisfaction *pro tanto*. *Dunham v. N. E. Mut. Ins. Co.*, 1 Low., 253.

§ 1271. It is incumbent on a defendant who claims a vessel under a condemnation, by a foreign tribunal, to prove that the tribunal was properly constituted. Failing to do this the condemnation is a nullity. *Snell v. Faussatt*, 1 Wash., 271.

§ 1272. **Judgment in rem.**—The sentence of a foreign court of competent jurisdiction, acting *in rem*, is conclusive in respect to the matters on which it directly decides. *Peters v. Warren Ins. Co.*, 3 Sumn., 389.

§ 1273. The sentence of acquittal of a foreign court acting *in rem* in cases of revenue, seizures, and prize, is conclusive in the absence of fraud. A sentence of acquittal or condemnation cannot be avoided upon the ground that there was a concealment of facts. *Magoun v. New England Marine Ins. Co.*, 1 Story, 157.

§ 1274. **Decree as to title, how far conclusive.**—The judgment of a foreign court upon a question of title cannot preclude a claimant from introducing evidence in a second suit, in another country, for other property. *Aspden v. Nixon*, 4 How., 467.

§ 1275. **Foreign decree in conflict with principles of home law.**—Where a foreign court, not of admiralty, has decided a case on different principles from those here recognized, and leading to a different result from what would be here arrived at, though professedly deciding according to our law, United States courts are not concluded by such decision. *Lang v. Holbrook*, Crabbe, 179.

§ 1276. **Judgment in personam as a bar.**—An unsatisfied foreign judgment *in personam* for damages sustained in a collision is not a bar to a libel *in rem* in our courts for the same damages, though the judgment is *res judicata* as to the extent of the libellant's damages from the collision. *The Propeller East*, 9 Ben., 76.

§ 1277. **Dismissal of bill a bar to another suit.**—A decree in a trade-mark suit in England, dismissing a bill, is a bar to a suit in the courts of this country brought by the same plaintiff, upon the same facts, and for the same relief, against an agent of the defendant in the first suit residing in this country. *Lea v. Deakin*, \* 18 Am. L. Reg. (N. S.), 322.

§ 1278. **Action against underwriters.**—*Quere*, whether a foreign sentence of condemnation be conclusive evidence in an action against the underwriters? *Fitzsimmons v. Newport Ins. Co.*, 4 Cr., 185.

§ 1279. *Foreign court judge of its own powers.*—The decree of the Mexican state of Tamaulipas, of October, 1827, in relation to land claimed for the ejidos of the city of Matamoras, cannot be called in question in an action relating to the lands affected. That tribunal was the judge of its own powers, and courts are only at liberty to construe it. The resolution of the congress of Tamaulipas, of October, 1848, after the separation of that state from Texas, that no title to lands across the Rio Grande passed by the former decree to the city of Matamoras, while not *res judicata*, is valuable as settling the law of that state at the time the decree was made. *City of Brownsville v. Cavazos*, 2 Woods, 293.

## IX. ACTIONS ON JUDGMENTS.

SUMMARY—*Pleading*, §§ 1280-1282.—*Decrees in equity*, § 1281.

§ 1280. In an action upon a decree of a court of general jurisdiction, and especially of a court whose jurisdiction is co-extensive with the state, it is not necessary to allege the legal obligation of the decree within the territorial jurisdiction of the court by which it was pronounced. *Pennington v. Gibson*, §§ 1283-85.

§ 1281. In every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by said judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other. *Ibid.*

§ 1282. In an action upon the judgment or decree of a court of general jurisdiction it is not necessary to allege that the court had jurisdiction to pass the decree or judgment against the defendant. *Ibid.*

[NOTES.—See §§ 1286-1316.]

## PENNINGTON v. GIBSON.

(16 Howard, 65-82. 1853.)

## Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—The defendant in error, a citizen of the state of New York, instituted in the circuit court an action of debt against the plaintiff in error, a citizen of the state of Maryland, to recover the amount of a decree, with the costs thereon, which had been rendered in favor of the defendant against the plaintiff in error by the supreme court in equity in the state of New York. The averments in the declaration are as follows: That at a general term of the supreme court in equity of the state of New York, one of the United States of America, held at the court-house in the village of Cooperstown, in the county of Otsego, in the state of New York, on the first Monday in November in the year 1848, present William H. Shankland (and others), justices, it was ordered, adjudged and decreed by the said court in a certain suit therein pending, wherein the said Lyman Gibson was complainant and the said Josias Pennington (and others) were defendants, that the said Lyman Gibson recover against the said Josias Pennington, and that the said Josias Pennington pay to the said Lyman Gibson, the amount of the consideration money paid by the said Lyman Gibson to a certain Samuel Boyer as agent and attorney of the said Josias Pennington, as should appear by the several indorsements upon the contract mentioned and set forth in the bill of complaint, and produced and proved as an exhibit in said suit, with interest on the several payments and indorsements respectively, amounting in the aggregate, on the 25th day of November, 1848, to the sum of \$5,473.18, and also that the said Josias Pennington pay to the said complainant his costs in said suit, which were taxed at the sum of \$661.68, as by the said decree duly signed and enrolled at a special term of the supreme court in equity aforesaid, held on the

30th day of April in the year 1849, at the village of Bath, in the county of Steuben, in the state of New York, and now remaining in the office of the clerk of Steuben county aforesaid, will on reference appear.

To the declaration as above stated the now plaintiff in error demurred; and upon a joinder in demurrer the court overruled the demurrer of the said defendant, and gave judgment for the plaintiff, the now defendant in error, for the debt and costs in the declaration set forth, together with costs of suit.

The defendant in the circuit court assigned for causes of demurrer the three following: 1. For that it appears from the said declaration that the cause of action in this case is an alleged decree of an alleged court of equity, as set forth in the said declaration, whereas an action at law cannot be maintained in this court on such a decree; at least, without an averment in pleading that said decree within the limits of its territorial jurisdiction is of equal efficacy with a judgment at law. 2. For even if an action at law can be maintained for the recovery of the sums of money directed by such alleged decree to be paid, as stated in said declaration, yet the form of action adopted in this case is not the proper form of action for the enforcement of such a recovery. 3. For that it does not appear in and by the said declaration, nor is it averred in any manner, that the said alleged court of equity had any jurisdiction to pass a decree against this defendant for payment to the plaintiff of any of the sums of money in the said declaration mentioned.

In considering these causes of demurrer, the attention is necessarily directed to the ambiguous terms assumed in the first assignment by propounding a proposition general or universal in its character, and afterwards conceding a modification or change in that proposition inconsistent not merely with its scope and extent, but with its essential force and operation. For instance, it is first stated that "the cause of action is an alleged decree of an alleged court of equity, whereas an action at law cannot be maintained in this court on such a decree." We can interpret this proposition to have no other intelligible meaning than this, and to be comprehended in no sense more restricted than this, namely, that an action at law cannot be maintained in a court of law when the cause of action shall be a decree of the court of equity. In other words, that the character of the foundation or cause of action, namely, its being a decree of a court of equity, must, in every such instance, deprive the court of law of cognizance of the cause. The proposition, thus generally put, is then followed by a qualification in these words, "at least without an averment in pleading that the decree within its territorial jurisdiction is of equal efficacy with a judgment at law." By this language the universality of the previous proposition is modified, or rather contradicted, for it contains an obvious concession, that, provided a particular efficiency can be affirmed with regard to it, an action at law may be maintained even upon a decree of a court of equity.

§ 1283. *An action of debt can be maintained upon a decree by a court of equity as well as upon a judgment at law.*

We will first examine the correctness of the general position that an action at law cannot be maintained upon a decree in equity; and will, in the next place, inquire how far the jurisdiction of the court pronouncing this decree, and the efficiency of its proceedings with reference to the parties before it, may be inferred or rightfully taken notice of, from its style or character, or from proper judicial knowledge of the subject-matter of its cognizance, independently of a particular special averment.

We are aware that at one period courts of equity were said not to be courts of record, and their decrees were not allowed to rank with judgments at law, with respect to conflicting claims of creditors, or in the administration of estates; but these opinions, the fruits of jealousy in the old common lawyers, would now hardly be seriously urged, and much less seriously admitted, after a practice so long and so well settled as that which confers on courts of equity, in cases of difficulty and intricacy in the administration of estates, the power of marshaling assets, and in the exercise of that power the right of controlling the order in which creditors, either legal or equitable, shall be ranked in the prosecution of their claims. The relative dignity of courts of equity, and the binding effect of their decrees when given within the pale of their regular constitution and jurisdiction, are no longer subjects for doubt or question.

We hold no doctrine to be better settled than this: that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court, solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law upon parties and their interests regularly within its cognizance. It would follow, therefore, that wherever the latter, received with regard to its dignity and conclusiveness as a record, would constitute the foundation for proceedings to enforce it, the former must be held as of equal authority. These are conclusions which reason and justice and consistency sustain, and an investigation will show them to be supported by express adjudication. It is true that, owing to the peculiar character of equity jurisprudence, there are instances of decisions by courts of equity which can be enforced only by the authority and proceedings of these courts. Such, for example, is the class of cases for specific performances; or wherever the decision of the court is to be fulfilled by some personal act of a party and not by the mere payment of an ascertained sum of money. But this arises from the nature of the act decreed to be performed, and from the peculiar or extraordinary power of the court to enforce it, and has no relation whatsoever to the comparative dignity or authority between judgments at law and decrees in equity.

We lay it down, therefore, as the general rule, that, in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other.

The case of *Sadler v. Robins*, 1 Camp., 253, was an action upon a decree of the high court of chancery in the Island of Jamaica, for a sum of money; "first deducting thereout the full costs of the said defendants expended in the said suit, to be taxed by one of the masters of the said court; and also deducting thereout all and every other payment which S. and R., or either of them, might on or before the 1st day of January, 1806, show to the satisfaction of the said master, they or either of them had paid," etc. In this case Lord Ellenborough said: "Had the decree been perfected I would have given effect to it as to a judgment at law. The one may be the consideration for an *assumpsit* equally with the other. But the law implies a promise to pay a definite, not an indefinite sum."

The case of *Henly v. Soper*, 8 Barn. & Cress., 16; of *Dubois v. Dubois*, 6 Cowen, 496, and of *McKim v. Odom*, 3 Fairfield, 94, are all expressly to the

point that the action of debt may be maintained equally upon a decree in chancery as upon a judgment at law. But if this question had been left in doubt by other tribunals, it must be regarded as settled for itself by this court in the explicit language of its decision in the case of *Hopkins v. Lee*, 6 Wheat., 109, where it is declared, as a general rule, "that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or in any other court. Hence, a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points decided between the parties to such suit. In this there is, and ought to be, no difference between a verdict and judgment in a court at law and a decree of a court of equity. They both stand upon the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries."

The case of *Dubois v. Dubois*, 6 Cowen, was an action of debt upon a decree for a specific sum, by a surrogate of one of the counties of the state of New York. One of the objections in that case was, that the action of debt could not be maintained; and another, that no jurisdiction was shown by the declaration. The supreme court in its opinion say: "The principal question raised is, whether debt will lie. The general rule is, that this form of action is proper for any debt of record, or by specialty, or for any sum certain. It has been decided that debt lies upon a decree for the payment of money made by a court of chancery in another state, and no doubt the action will lie upon such a decree in our domestic courts of equity. The decree of the surrogate, unappealed from, is conclusive, and determines forever the rights of the parties. It may be enforced by imprisonment, and is certainly evidence of a debt due; whether the surrogate's court be a court of record need not be decided. It has often been said that a court of chancery is not a court of record. It is sufficient that a decree in either court, unappealed from, is final — debt will lie."

In opposition to the doctrine we have laid down, the case of *Carpenter v. Thornton*, from 3 Barn. & Ald., 52, has been cited to show that the action of debt will not lie upon a decree of a court of equity. But with respect to the case of *Carpenter v. Thornton*, it must be remarked that Lord Tenterden, who decided that case, has, in the subsequent case of *Henly v. Soper*, 8 Barn. & Cress., 20, explicitly denied that the former case can be correctly understood as ruling any such doctrine or principle as that for which it has been here adduced. In *Henly v. Soper* his lordship says of *Carpenter v. Thornton*: "I think it does not establish the broad principle for which it is cited. It appears by the report that I then expressed myself with much caution, and I do not find that I ever said that a decree of a court of equity fixing the balance due on a partnership account could not be enforced in a court of law unless the items of the account could be sued for. My judgment proceeded on the particular circumstance of that case; the bill was for the specific performance of an agreement, which is a matter entirely of equitable jurisdiction. But it is a general rule that if a partnership account be settled, and a balance struck by due authority, that balance may be recovered in an action at law."



In support of the objection that the action in this case, founded on a decree in chancery, could not be maintained, the counsel for the plaintiff in error has cited the case of *Hugh v. Higgs and wife*, reported in 8 Wheat., 697 (ACTIONS, § 38). This is a short case, presenting no precise statement of the facts involved in it, and as far as the facts are disclosed by the report, they are given in a somewhat confused and ambiguous form. It is true that the objection to the action as founded on a decree in chancery is said by the court to have been urged in its broadest extent. But if we look to the decision of this court and the reasoning upon which that decision is rested, we find the objection to the judgment of the circuit court, or rather the principle of that objection, narrowed and brought considerably within the extent of the objection itself. For this court say that the judgment of the circuit court must be reversed for error in the opinion, which declares that the action is maintainable on the decretal order of the court of chancery. It might very well be error to allow the action of debt upon a decretal order of the chancery, and yet perfectly regular to sustain such an action upon the final decree. The former is subject to revision and modification, the latter is conclusive upon the rights of the parties.

There is yet another ground on which this case of *Hugh v. Higgs and wife*, so imperfectly stated, might form an exception to the rule which authorizes actions of debt upon decrees in equity. In the case last mentioned the action at law was brought and the judgment rendered within the regular limits of the equity jurisdiction of the court, and to the full extent of which limits the court of equity had the power to enforce its decrees. Under these circumstances it might well be ruled that a party having the right to avail himself directly of the power and process of the court should not capriciously relinquish that right, and harass his adversary by a new and useless litigation. An exception like this is perfectly consistent with the rule that where the decree of the court of equity cannot be enforced by its own process, and within the regular bounds of its jurisdiction, such decree, when regular and final, and when especially it ascertains and declares the simple pecuniary responsibility of a party, may, and for the purposes of justice must, be the foundation of an action at law against that party whose responsibility has been thus ascertained. Upon this principle it is that the courts of law in England, whilst they have been inclined to restrict the plaintiff in the proper process of the court of equity for the purpose of enforcing the decrees of the court within the bounds of its jurisdiction, have undeviatingly maintained the right of action upon decrees pronounced by the colonial courts. The process of the colonial courts could not run into the mother country, but this fact did not impair the rights settled by the decrees of those courts or render them less binding or final as between the parties. On the contrary it is assigned as the special reason why the courts of law should take cognizance of such causes, without which an entire failure of justice would ensue.

For this rule of decision in the English courts, the cases of *Sadler v. Robins*, and of *Henly v. Soper*, may again be recurred to; and, for its adoption by courts in our own country, may be cited *Post v. Neatie*, 3 Caines, 22, and *Dubois v. Dubois*, and *McKim v. Odom*, already mentioned.

Having disposed of the general proposition in the first assignment of causes of demurrer by the plaintiff in error, we will next inquire into the force of the condition or modification he has annexed to it, in the alleged necessity for an

express averment in pleading of the efficacy or legal obligation of the decree within the territorial jurisdiction of the court by whom the decree has been pronounced.

Of the binding obligation and conclusiveness of decrees in equity where the parties and the subject-matter of such decrees are within the regular cognizance of the court pronouncing them, and of their equality in dignity and authority with judgments at law, we have already spoken. It remains for us only to consider what may be legally intended or concluded from the pleadings in this cause as to the territorial extent of jurisdiction in the court whose decree is made the foundation of this action.

The declaration avers: "That at a general term of the supreme court in equity for the state of New York, one of the United States of America, held at the village of Cooperstown in the state of New York, on the first Monday in November, in the year 1848, it was ordered, adjudged and decreed, etc.; and further, that on the 25th of November, 1848, the complainant's costs were taxed, etc., as by the said decree duly signed and enrolled at a special term of the said supreme court, etc., and now remaining in the office, etc., reference being thereto had, will appear."

§ 1284. *The presumption is always in favor of a judgment or decree of a court of general jurisdiction.*

It is undeniably true in pleading that where a suit is instituted in a court of limited and special jurisdiction, it is indispensable to aver that the cause of action arose within such restricted jurisdiction; but it is equally true with regard to superior courts or courts of general jurisdiction, that every presumption is in favor of their right to hold pleas, and that if an exception to their power or jurisdiction is designed, it must be averred and shown as matter of defense. Such is the general rule as laid down by Chitty, volume 1, page 442. So too in the case of *Shumway v. Stillman*, in 4 Cowen, 296. The supreme court of New York, speaking with reference to a judgment rendered in another state, says: "Every presumption is in favor of the judgment. The record is *prima facie* evidence of it, and will be held conclusive until clearly and explicitly disproved."

§ 1285. *United States courts take judicial notice of the laws and decisions of the states and of state courts.*

And in further affirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several states of this Union; and that with respect to these nothing is required to be specially averred in pleading which would not be so required by the tribunals of those states respectively. In the case before us the declaration avers that the decree on which the action is founded was a decree of the supreme court in equity of the state of New York — of a court whose jurisdiction in equity was supreme, not over a section of the state; but that it was the supreme court as to subjects of equity of the state, that is, of the entire state; and its decrees being ranked, in our opinion, as equal in dignity and obligation with judgments at law, its decree in the case before us was of equal efficacy with any such judgment throughout its territorial jurisdiction, or, in other words, throughout the extent of the state.

The second and third causes of demurrer assigned by the plaintiff in error are essentially comprised in the first assignment, and are mere subdivisions of that assignment; and in disposing, therefore, of the first, the second and third

causes of demurrer are in effect necessarily passed upon. We are of the opinion that the demurrer of the plaintiff in error was properly overruled, and that the judgment of the circuit court be, as it is hereby, affirmed with costs.

§ 1286. *Nul tiel record*.—In an action upon a judgment, the plea of *nul tiel record* is the proper and only plea which brings before the court the validity of the record and the description of it as set forth in the declaration. *Jacquette v. Hugunon*,\* 2 McL., 129.

§ 1287. Under the plea of *nul tiel record*, the judgment only is put in issue. *Bergen v. Williams*, 4 McL., 125.

§ 1288. Payment on a judgment cannot be proved under *nul tiel record*, and if a party could avail himself of it he must plead it. *Tunstall v. Robinson, Hemp.*, 229.

§ 1289. Under a plea of *nul tel record* to a suit on a judgment, the record must be rejected if upon its face it appears that no notice was served upon the person against whom it was rendered. *Thompson v. Emmert*,\* 4 McL., 96.

§ 1290. "*Nil debet*" is not a good plea to an action brought in the United States circuit court for the eastern district of Pennsylvania on a judgment obtained in the circuit court of the United States for the district of Delaware. *Reed v. Ross, Bald.*, 86.

§ 1291. *Nil debet* cannot be pleaded to a judgment of another state, although the suit was commenced by attachment of property, where the defendant afterwards appeared and took defense. *Mayhew v. Thatcher*,\* 6 Wheat., 129.

§ 1292. A plea of *nil debet*, as it puts in issue the existence of the debt at the time of pleading, cannot be made to an action on a judgment either in the state where it is rendered or in any other state. *Westerwelt v. Lewis*,\* 2 McL., 511.

§ 1293. *Nil debet* is not a good plea to an action founded on the judgment of another state. *Mills v. Duryee*, 7 Cr., 481; *Bastable v. Wilson's Adm'r*, 1 Cr. C. C., 124; *Maxwell v. Stewart*,\* 22 Wall., 77.

§ 1294. *Nil debet* is not a good plea to an action of debt in the District of Columbia, brought upon a judgment of a state court in Kentucky; but the defendant may, with the leave of the court, withdraw it, and plead *nul tiel record*, on payment of the costs of the term, and a continuance of the cause until the next term if the plaintiff should desire it. *Short v. Wilkinson*, 2 Cr. C. C., 22.

§ 1295. *Jurisdiction*.—The form of the record of a judgment is regulated by the practice of the court in which the action is prosecuted. In a suit upon such a record it is only necessary for it to show that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment has in fact been rendered. *Maxwell v. Stewart*,\* 22 Wall., 77.

§ 1296. Where a judgment of a court having jurisdiction to render it is introduced in evidence, as where a suit is brought upon it, no error in the proceedings in which the judgment was rendered can be objected to. *French v. Lafayette Ins. Co.*,\* 5 McL., 461.

§ 1297. *Contradiction of record*.—In a suit upon a judgment, where the record sued on shows jurisdiction of the person of the defendant, it cannot be contradicted. *Westerwelt v. Lewis*,\* 2 McL., 511.

§ 1298. It seems that in an action upon a judgment the defendant cannot contradict the record by showing that he was not served with process in the suit in which the judgment was rendered. *Todd v. Crumb*,\* 5 McL., 172.

§ 1299. A judgment is conclusive of the subject-matter of controversy, and when sued on no plea can be filed which contradicts the record. The plea of *nil debet* cannot be pleaded. *Jacquette v. Hugunon*,\* 2 McL., 129.

§ 1300. *Inquiry going back to original cause of action*.—In an action founded upon a judgment inquiry cannot be made, whether the obligation on which it was founded was given by the defendant alone or jointly and severally with others. And if the inquiry could be made it would be limited to the record, and the evidence, that is, the obligation itself could not be resorted to. *United States v. Thompson*,\* Gilp., 614.

§ 1301. *Waiver of trial by jury*.—It cannot be objected in a suit upon a judgment that the cause in which the judgment was rendered was tried by the court without a waiver of a trial by jury entered upon the journal. *Maxwell v. Stewart*,\* 21 Wall., 71; *Maxwell v. Stewart*,\* 22 Wall., 77.

§ 1302. *Allegation of jurisdiction*.—The Declaration in an action upon a judgment of a court of general jurisdiction need not allege that the court had jurisdiction of the person of the judgment debtor. *Tenny v. Townsend*, 9 Blatch., 274.

§ 1303. *Profert of former judgment*.—A former judgment is not pleaded with a profert, but a profert is tendered in reply to the plea or replication of *nul tiel record*. *Burnham v. Webster, Dav.*, 236.

§ 1804. **Writ of inquiry and intervention of jury.**—As by the local law and practice of Louisiana questions of fact in civil cases are tried by the court unless either of the parties demands a jury, the interest upon a judgment sued on in that state may be computed without a writ of inquiry and the intervention of a jury. *Mayhew v. Thatcher*, \* 6 Wheat., 129.

§ 1805. **Records of courts of equity binding in federal courts.**—The records of courts of law and of equity are of equal dignity and binding obligation in the federal courts; and in all cases where an action of debt can be maintained upon a judgment at law to recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount. *Nations v. Johnson*, 24 How., 195.

§ 1806. **Decretal orders.**—No action at law will lie on the decretal order of a court of equity. *Hugh v. Higgs*, 8 Wheat., 697.

§ 1807. **Decree for alimony — Suit in federal court.**—Where a valid decree for alimony has been rendered in a state court, it may be enforced against the husband in a federal court where he has removed from his former domicile, leaving the wife behind, even though the decree is simply a *mensa et thoro*, and even though the husband, in his new domicile, has obtained an absolute divorce from her. *Barber v. Barber*, 21 How., 595.

§ 1808. **Service by publication.**—After an erroneous decree had been entered in their favor, defendants who had appeared in the trial court withdrew their appearance and removed from the state. The decree was reversed on writ of error and a decree entered in favor of the plaintiff. The defendants did not appear in the appellate court, and they were notified of the proceedings there by publication, according to the state law. In a suit against the defendants by the plaintiffs in a federal court, it was held that the decree was conclusive of the matters determined by it. *Nations v. Johnson*, 24 How., 195.

§ 1809. **Counter-claim applicable in former suit.**—In an action on a judgment the defendant cannot set up a counter-claim which might and should have been litigated and decided in an issue in the action in which the judgment was rendered. *Barras v. Bidwell*, \* 8 Woods, 5.

§ 1810. **A statute of limitations which provides that "all actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract or promise in writing, must be brought within fifteen years;" and that "all other actions not herein enumerated must be brought within four years after such right of action shall have accrued," does not embrace an action on a judgment.** *Todd v. Crumb*, \* 5 McL., 172.

§ 1811. **In an action upon a judgment, the statute of limitations of the state where the suit is brought may be pleaded; also a release or payment.** *Jacquette v. Hugunon*, \* 2 McL., 129.

§ 1812. **The act of limitations of Virginia of 1826 does not embrace actions founded on judgments.** *Ross v. Duval*, 13 Pet., 45 (§§ 1467-72).

§ 1813. **Satisfaction by attachment in former suit.**—In an action upon a judgment a demurrer setting up the defense of payment and satisfaction, in the fact that certain property of the defendant had been taken under an order of attachment in the suit and had not been legally accounted for, was overruled, as it did not appear that the property taken under the attachment was sufficient to discharge the judgment, and it could be inferred from the record that the property had been restored before judgment, to the defendant upon the execution of a delivery bond. *Maxwell v. Stewart*, \* 22 Wall., 77.

§ 1814. **Equitable defenses.**—In an action at law in a federal court on a judgment in another court, equitable defenses cannot be interposed. *Montejo v. Owen*, 14 Blatch., 324.

§ 1815. **A release is not a good plea to a suit on a judgment, where, subsequent to the release, the judgment has been revived upon *scire facias* issued, affidavit of defense and plea of payment filed, and verdict of jury rendered.** The release should have been given in evidence under the plea of payment to the *scire facias*. *Snyder v. Brachen*, \* 5 Biss., 80.

§ 1816. **Fraud cannot be pleaded to an action in one state upon a judgment obtained in another.** *Maxwell v. Stewart*, \* 22 Wall., 77.

## X. ASSIGNMENT OF JUDGMENTS.

### SUMMARY — Notice to debtor, §§ 1817, 1818.

§ 1817. **An assignee of a judgment who refuses the debtor information concerning the assignment, when applied to by him, estops himself from afterwards claiming the debtor had notice of the assignment.** *Cavender v. Grove*, §§ 1819-22.

§ 1818. **Where a judgment is assigned without an entry upon the record as required by statute, and the debtor arranges a satisfaction of it with the original creditor without notice of the assignment, it is a valid satisfaction.** *Ibid.*

[NOTES.— See §§ 1323-1331.]

## CAVENDER v. GROVE.

(Circuit Court for Indiana: 4 Bissell, 269-278. 1868.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—In a proceeding in admiralty in this court, on the 28th of February, 1868, Stephen Grove obtained a judgment by default against Anthony J. Cavender for \$459.25. Execution has been issued upon this judgment and levied on Cavender's property. Cavender now moves for an entry of satisfaction of this judgment. Among other things, Cavender, in support of his motion, produced a paper signed by Grove, dated June 26, 1868, acknowledging full satisfaction of the judgment and directing the marshal to return the execution. Cavender also showed in evidence the clerk's receipt in full for \$138.57, including all costs in the case, dated July 17, 1868.

There was evidence in support of said acknowledgment of satisfaction by Grove, to the effect that Cavender had complained, after the judgment was rendered, that it was given for a far larger sum than was due; that deductions by way of payment, or set-off, or counter-claim, should have been credited on the claim, and were not; and that in the making of the settlement, at the time when the acknowledgment of satisfaction was executed, these deductions were taken into the calculation and allowed by Grove, as well as certain payments made by Cavender after the rendition of the judgment. And I think these facts are sufficiently established.

It is certain that at no time after the judgment was rendered did Cavender pay on the judgment anything like the amount of it. In opposition to the motion, it was proved that, in consideration of \$5, Grove, on the 5th of March, 1868, and before his acknowledgment of satisfaction, assigned the judgment to David D. Doughty. This assignment was not made on the record of the case as required by the statute of Indiana, but on a separate paper, which was filed among the papers of the case July 1, 1868. Doughty, as well as Grove, appears by counsel and resists the motion.

§ 1319. *Where the assignee of a judgment refuses to give the judgment debtor any information upon the subject of the assignment he is estopped from afterwards claiming that the debtor had notice of such assignment.*

The evidence further shows that Cavender, soon after this assignment, heard a rumor of it, and applied to Doughty and to the attorney of Grove for information on the subject, and that they told him it was assigned, but would not tell him to whom the assignment was made, because, as they allege, they did not want to be pestered by him about it. The attorney, however, informed him that if he would make arrangements to pay a part of it, he would tell him who was the assignee. All this happened before the date of the acknowledgment of satisfaction. Other evidence was given on both sides, on the question whether, at the time of execution of the acknowledgment of satisfaction, Cavender had notice of the assignment. I think that such notice is not established by the evidence; and I think that, under all the circumstances, the failure of Doughty to inform Cavender that he, Doughty, was the assignee, estops him from now alleging that Cavender had notice. Fair dealing required that when Cavender asked Doughty for information touching this assignment, he should have told him the whole truth. It might indeed have been otherwise, if Cavender had, from any other source, had satisfactory information of the assignment before the settlement with Grove. But, though there was some evidence leading to that conclusion, it is too vague to establish

it. Upon the whole, therefore, I conclude that Cavender, when he took the acknowledgment of satisfaction, had no legal or equitable notice that Doughty was assignee of the judgment.

§ 1320. *The assignee of a judgment, the assignment whereof is not of record, and of which the debtor has no notice, holds it subject to all equities. (a)*

Since then Doughty did not procure the assignment of record, as required by the statute; and since Cavender, when he settled the judgment with Groves, was not aware that Doughty was the owner of it, Doughty must be considered as holding it subject to all equities. *Robeson v. Roberts*, 20 Ind., 155. And I thus conclude the more readily and willingly, when I consider that he gave only \$5 for it — less than one-ninetieth of the face of it. I cannot think that a purchaser under such circumstances is entitled to the favorable consideration of any court. And, upon the whole, I think that I ought to regard the claim of Doughty as entirely out of the question in considering the present motion.

Then, the only point for inquiry is whether, as between Grove and Cavender, this judgment ought to be deemed satisfied.

The written acknowledgment of satisfaction shown in evidence is certainly sufficient *prima facie* proof. It has been attempted, however, to overthrow the *prima facie* case thus made by other evidence showing clearly enough that but a small portion of the judgment has been paid since its rendition. As already stated, it appears by the evidence that after the judgment by default was rendered, Cavender complained that the judgment was for too large a sum; and that Grove ought to have credited his claim with divers items, and only taken judgment for a small balance; whereas he took it for the whole claim without these credits. And it appears further by the evidence, that, in the negotiation which resulted in the execution of the acknowledgment of satisfaction, these credits were insisted upon by Cavender, and probably allowed by Groves; though in relation to this whole matter, the evidence is very vague and unsatisfactory.

§ 1321. *Satisfaction of judgment.*

It is certain that the payment of a sum less than the amount due on a judgment or other debt cannot operate as a full satisfaction thereof, even though it is agreed between the parties, at the time of such payment, that it shall so operate. And it is equally clear that, on a motion to enter satisfaction of a judgment, nothing can be heard in support of it which might have been set up as a defense to the action on which the judgment was rendered. But I deem it equally clear that if such a defense is omitted to be pleaded to the action, and if it might be the subject of a cross-action against the party recovering the judgment, the matter of such defense may very well, by agreement of the parties, furnish a sufficient consideration for a contract between them to satisfy the judgment. Such, I think, was the case. Cavender paid some money to Grove after the judgment was rendered. He had a claim against Grove in relation to the subject-matter of the action before the judgment was rendered. This claim Grove afterward recognized as valid and subsisting, and the settlement

(a) The statutes of Indiana require the assignment of a judgment to be of record and witnessed by the clerk. A judgment debtor is not bound by an assignment of the judgment not put of record and witnessed by the clerk, as the statute requires, until he has notice of it. Payment at any time before that to the original judgment creditor will be a satisfaction.

The assignee of a judgment, by refusing the judgment debtor information concerning the assignment, when applied to, estops himself from afterwards claiming that the judgment debtor had notice of the assignment. *The Lulie D.*, \* 4 Biss., 249.

of which he seems to have taken as a part of the consideration upon which he executed the acknowledgment of satisfaction of the judgment. I think that this was all right; and that I ought to hold him to his bargain.

§ 1322. *A written acknowledgment of satisfaction of a judgment is prima facie evidence of its satisfaction.*

It has been urged, indeed, in opposition to the view above expressed, that the facts from which the conclusion is deduced are not well proved. It must be admitted that the evidence of these facts is by no means satisfactory. But it should be remembered that Cavender, by the production in evidence of the written acknowledgment of satisfaction of the judgment, *prima facie* established all that was necessary to sustain his motion. The burden then devolves on Grove to overthrow the *prima facie* case thus made. It did not devolve on Cavender to prove that the acknowledgment of satisfaction was founded on a sufficient consideration; but it devolved on Grove to prove that the consideration on which the acknowledgment was founded was insufficient. On this point arises the uncertainty of the evidence. It was for him to remove that uncertainty; and I think he has not done it. On the contrary, I am inclined to think that I may safely deduce from the evidence, vague though it be, the facts which I have above stated. It follows that the judgment must be entered satisfied.

§ 1323. *At common law.*—Judgments and decrees are not assignable at law, so as to vest the legal title in the assignee, and the latter takes only an equitable interest. *United States v. Samperyac, Hemp.*, 119.

§ 1324. A decree is not assignable at law, but there may be an equitable transfer for value. *Coates v. Muse*, 1 Marsh., 551.

§ 1325. *What assigned.*—An assignment of a judgment, and all bonds and instruments taken therein and connected therewith, includes a bond given by the judgment debtors to secure the release of their property which was attached in the action. *George v. Tate*, 12 Otto, 564.

§ 1326. Where, at the time of the assignment of a judgment, the assignee gave to the assignor a bond to repay to the assignor three-fourths of the amount realized from it, it was held that this was really an assignment of only one-fourth of it, and that the equitable interest of the assignee therein was only one-fourth. *Rhodes v. Farmer*,\* 17 How., 464.

§ 1327. *Misrepresentation.*—Where defendants, by misrepresentation of their agent, procured the deputy clerk to receive an assignment of a judgment and depreciated paper in payment of a judgment, for which he gave a receipt, the plaintiffs are not bound by it, and may issue execution, and the court will not set such execution aside. *Weldes v. Edsell*, 2 McL., 366.

§ 1328. *Defenses against assignee.*—The purchaser of a judgment sold by assignee in bankruptcy at public vendue is liable to all the defenses and remedies available against the original plaintiff; and cannot enforce payment if the judgment was fraudulent. *Noyes v. Willard*, 1 Woods, 187.

§ 1329. Where a judgment in a tort action is rendered against all the wrong-doers, a secret agreement between the judgment creditor and one of the wrong-doers, that if the latter will not defend the former will not enforce the judgment against him, is no defense as against an assignee of the judgment without notice. *Selz v. Unna*, 6 Wall., 327.

§ 1330. If one of several joint judgment debtors pays the judgment to the creditor and colorably procures an assignment thereof to be made to a third person, the latter cannot recover thereon, even though he may have loaned the judgment debtor the money with which he paid the judgment, and have made such loan on an understanding between them that he was to have the benefit of an assignment of the judgment as security for his advance or loan. *Arnott v. Webb*,\* 1 Dill., 362.

§ 1331. *Parol evidence* is admissible to rebut or explain a written assignment of a judgment, in a suit in equity for the specific enforcement of such assignment. *Rhodes v. Farmer*,\* 17 How., 464.

## XI. RELEASE AND SATISFACTION OF JUDGMENTS.

SUMMARY — *Partial satisfaction no bar to writ of error, § 1332. — Levy of execution a satisfaction, when, §§ 1333, 1334. — If satisfaction is entered it must be for all purposes, § 1335. — Recovery of a judgment on a judgment, § 1336. — Discharge of defendant from imprisonment, § 1337. — Second judgment should not be satisfied while first remains in force, § 1338. — Sale after satisfaction, § 1339. — Taking defendant in execution, § 1340.*

§ 1332. The partial satisfaction of a judgment before a writ of error is sued out by the plaintiff is not a bar to the writ of error. [GRIER, NELSON and SWAYNE, JJ., dissent, holding that the election to execute the judgment is a *retraxit* of the writ of error.] *United States v. Dashiell*, §§ 1341-43.

§ 1333. The levy of an execution on personal property sufficient to satisfy the judgment is not *per se* an extinguishment of the judgment in every case. It creates only a *prima facie* presumption in any case. And the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property. Where only a part of the judgment has been satisfied, and a sale of the rest of the property has been discontinued at the request of the defendant and for his benefit, the fact that the property levied on is sufficient to satisfy the execution will not operate as an extinguishment of the judgment. *Ibid.*

§ 1334. No presumption of the extinguishment of a judgment arises from a levy of execution upon land sufficient to satisfy it. The contrary rule, obtaining where the levy is upon personalty, does not apply to a levy upon land. *Ibid.*

§ 1335. Upon an application for an order that satisfaction of a judgment be entered of record, the court cannot direct the judgment to be satisfied for one purpose and to continue in force as to another. Satisfaction, if entered, must be a discharge of the judgment for all purposes. *Griswold v. Hill*, §§ 1344-47.

§ 1336. The bringing of debt on a judgment, and recovering and perfecting a judgment thereon in another court, is not a satisfaction of the first, and will not warrant an entry of its satisfaction until the latter has in fact been satisfied. It was so held where a judgment had been recovered in a state court in an action of debt upon a judgment of a United States court. *Ibid.*

§ 1337. The cases which decide that where a prisoner in execution is discharged by consent of the creditor, on giving other security to satisfy the judgment, and such security fails, the judgment cannot be set up again, do not apply to a case where the debtor is discharged from imprisonment against the will of the creditor under a state law reserving to him certain rights as to future-acquired property. Such a discharge is not a satisfaction of the judgment; and especially where the state law provides that the judgment shall remain valid and effectual against any property which the debtor may acquire after his discharge. *Ibid.*

§ 1338. A judgment upon which another judgment is recovered in another court should not be satisfied upon the record while the second remains unsatisfied in fact. *Ibid.*

§ 1339. An execution issued upon a judgment after its full payment is absolutely void, and a sale under such execution passes no title. W. had a first and T. a second judgment lien on certain property. The judgment debtor paid the first judgment in full and had it assigned to his hired man, who paid no consideration. Subsequently the debtor confessed a judgment in favor of L. in order to prevent the latter from attaching, and to give L. a preference over T. he procured an assignment of W.'s judgment to be made to L., but no additional consideration was paid for this assignment. The debtor afterwards confessed a judgment in favor of one F., who had execution issued and purchased under his own judgment after L. had purchased the same at a sale under the judgment of W. *Held*, the judgment of W. had been satisfied by the debtor and that the subsequent sale thereunder was void as to F. *Lee v. Rogers*, §§ 1348-51.

§ 1340. A judgment debtor who had been arrested under a writ of *capias ad satisfaciendum* was released by the judgment creditor upon an agreement to abide the event of an issue to be formed for ascertaining by judicial decision whether he had the means of paying the judgment, and it was expressly acknowledged by the debtor in the agreement that the same was made for his accommodation and without prejudice to the creditor's rights by reason of the debtor's enlargement; upon the trial of this issue it was determined that the debtor had no means by which to satisfy the judgment. The debtor afterwards became possessed of property, and a bill in equity was filed to enjoin him from setting up as a discharge of the judgment his release from custody under the *capias ad satisfaciendum*. It was held that the taking of the body of the debtor in execution was a satisfaction of the judgment, that his release destroyed every effect of the judgment as the foundation of legal rights, and that the desired relief could not be given by a court of equity. *Magniac v. Thomson*, §§ 1352-56.

[NOTES. — See §§ 1357-1376.]



## UNITED STATES v. DASHIEL.

(3 Wallace, 688-703. 1865.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Defendants move to dismiss the case because it appears by the record, as they allege in the motion, that the judgment in the court below was in favor of the plaintiffs, and that before suing out the writ of error they obtained satisfaction of the judgment “by execution and sale.”

1. Principal defendant had been a paymaster in the army of the United States, and the record shows that the suit was commenced against him and the other defendant, as one of his sureties on the official bond of the former, given for the faithful discharge of his duties. Breach of the bond as assigned in the declaration was that the principal obligor failed to pay over or account for the sum of \$20,085.74 of the public moneys intrusted to his keeping, and for which he and his sureties were jointly and severally liable.

2. Claim of the plaintiffs was for that sum as shown in the treasury transcript, but the defendants in their answer denied the whole claim, and they also pleaded specially that the principal obligor was entitled to a credit of \$13,000, because, as they alleged, he was robbed, without any negligence or fault on his part, of that amount of the moneys so intrusted to his custody during the period covered by the declaration. Verdict was for the plaintiffs for the sum of \$10,318.22, and on the 18th day of January, 1860, judgment was entered on the verdict. Both parties excepted, during the trial, to the rulings and instructions of the court, and the record shows that their respective exceptions were duly allowed.

3. Execution was issued on the judgment on the 15th day of April, in the same year, and the return of the marshal shows that on the 28th day of the same month he seized certain real property and slaves, sufficient in all to satisfy the judgment. Formality of an advertisement prior to the sale was omitted by the marshal at the request of the principal defendant, and on the 5th day of June following, the marshal sold certain parcels of the real property at public auction, amounting in the whole to the sum of \$5,275, as appears by his return. Nearly half the amount of the judgment was in that manner satisfied, but the clear inference from the return of the marshal and the accompanying exhibit is that the sale was suspended and discontinued at the request of the principal defendant and for his benefit. Request for the postponement of the sale came from him, and it was granted by the marshal, as stated in the record, the better to enable the defendant to find purchasers for his property. Writ of error was sued out by plaintiffs on the 1st day of September, 1860, and was duly entered here at the term next succeeding, and since that time the case has been pending in this court.

§ 1341. *A judgment is not satisfied by the levy of an execution on land, and is only so prima facie by a levy on goods to a sufficient amount, and then only when the debtor is deprived of his property.*

4. Motion to dismiss is grounded solely upon the alleged fact that the judgment was satisfied before the writ of error was sued out and prosecuted. Matters of fact alleged in a motion to dismiss, if controverted, must be determined by the court. Actual satisfaction beyond the amount specified in the return of the marshal cannot be pretended, but the theory is that the levy of the execution in the manner stated affords exclusive evidence that the whole amount was paid, and it must be admitted that one or two of the decided cases referred

to appear to give some countenance to that view of the law; that is, they assert the general doctrine that the levy of an execution on personal property sufficient to satisfy the execution operates *per se* as an extinguishment of the judgment. *Mountney v. Andrews*, Croke Eliz., 237; *Clerk v. Withers*, 1 Salk., 322; *Ladd v. Blunt*, 4 Mass., 403; *Ex parte Lawrence*, 4 Cowen, 417. None of those cases, however, afford any support to the theory that any such effect will flow from the issuing of an execution and the levying of the same upon land. On the contrary, the rule is well settled that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution, and the creditor gains nothing beyond what he already had by the lien of his judgment. *Shepard v. Rowe*, 14 Wend., 260; *Taylor v. Ranney*, 4 Hill, 621. Reason given for the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits. *Reynolds v. Rogers*, 5 Ohio, 174. Many qualifications also exist to the general rule as applied to the levy of an execution upon the goods of the judgment debtor, as might be illustrated and enforced by numerous decided cases. Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment. *Green v. Burke*, 23 Wend., 501; *Ostrander v. Walter*, 2 Hill, 329; *People v. Hopson*, 1 Denio, 578. Rightly understood, the presumption is only a *prima facie* one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt, says Bronson, C. J., is gone, although the creditor may not have been paid. Under those circumstances the creditor must take his remedy against the officer, and if there be no such remedy he must bear the loss. *Taylor v. Ranney*, 4 Hill, 621.

Tested by these rules, and in the light of these authorities, it is very clear that the theory of fact assumed in the motion cannot be sustained. Satisfaction of the judgment beyond the amount specified in the return of the marshal is not only not proved, but the allegation is disproved by the amended record.

§ 1342. *Partial satisfaction of a judgment cannot bar a writ of error.*

5. Amended record undoubtedly shows that an execution was issued on the judgment, and that the same was partially satisfied before the writ of error in this case was prosecuted; but the defendants scarcely venture to contend that a partial satisfaction of the judgment before the writ of error is sued out is a bar to the writ of error, or that it can be quashed or dismissed for any such reason. Doubt may have existed upon that subject in the early history of the common law; but if so, it was entirely removed by the elaborate judgment of Lord C. J. Willes, in the case of *Meriton v. Stevens*, Willes, 272, which is most emphatically indorsed in a well considered opinion of this court. Nothing is better settled at the common law, says Mr. Justice Story, in the case of *Boyle v. Zacharie*, 6 Pet., 659 (§§ 1473-78, *infra*), than the doctrine that a *supersedeas*, in order to stay proceedings on an execution, must come before

there is a levy made under the execution; for if it come afterwards, the sheriff is at liberty to proceed upon a writ of *venditioni exponas* to sell the goods.

Form of the *supersedeas* at common law was, "that if the judgment be not executed before the receipt of the *supersedeas*, the sheriff is to stay from executing any process of execution until the writ of error is determined." Settled construction of that order was, "that if the execution be begun before a writ of error or *supersedeas* is delivered, the sheriff ought to proceed to complete the execution so far as he has gone." Directions in the leading case were accordingly that the sheriff should proceed to the sale of the goods he had already levied, and that he should return the money into court to abide the event of the writ of error. *Meriton v. Stevens*, Willes, 282.

§ 1343. *Writ of error, effect of; practice, etc.*

6. Effect of a writ of error, under the twenty-second section of the judiciary act, is substantially the same as that of the writ of error at common law, and the practice and course of proceedings in the appellate tribunals are the same except so far as they have been modified by acts of congress, or by the rules and decisions of this court. Service of a writ of error, in the practice of this court, is the lodging of a copy of the same in the clerk's office where the record remains. *Brooks v. Norris*, 11 How., 204 (APPEALS, §§ 1304-5). Whenever a defendant sues out a writ of error, and he desires that it may operate as a *supersedeas*, he is required to do two things, and if either is omitted he fails to accomplish his object: 1. He must serve the writ of error as aforesaid, within ten days, "Sundays exclusive," after the rendition of the judgment; and 2. He must give bond with sureties to the satisfaction of the court, for the benefit of the plaintiff, in a sum sufficient to secure the whole judgment in case it be affirmed. *Catlett v. Brodie*, 9 Wheat., 553 (APPEALS, § 1536); *Stafford v. Union Bank*, 16 How., 135 (APPEALS, §§ 1537-39). Security for costs only is required of the defendant when the writ of error sued out by him does not stay the execution, and he is not compelled, in any case, to make the writ of error a *supersedeas*, although it may be sued out within ten days after the judgment. 1 Stat. at Large, 404.

Plaintiff also may bring error to reverse his own judgment, where injustice has been done him, or where it is for a less sum than he claims; but he, like the defendant, is required to give bond to answer for costs. *Johnson v. Jebb*, 3 Burr., 1772; *Sarles v. Hyatt*, 1 Cow., 254. Writs of error at common law, whether sued out by plaintiff or defendant, operated in all cases as a *supersedeas*; but it has never been heard in a court of justice, since the decision in the case of *Meriton v. Stevens*, that they had any retroactive effect, or any effect at all, until they were allowed and served.

Applying these rules to the present case, it is clear that there was no conflict between the action of the marshal in obtaining partial satisfaction of the judgment in this case, and the pending writ of error which was subsequently sued out and allowed. Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not, and never was, a bar to a writ of error, where it appeared that the levy was made, or the payment was received, prior to the service of the writ, and there is no well-considered case which affords the slightest support to any such proposition. Subsequent payment, unless in full, would have no greater effect; but it is unnecessary to examine that point, as no such question is presented for decision. Where the alleged satisfaction is not in full, and was obtained prior to the allowance of the writ of error, the authorities are unanimous that it does not impair the right of the plaintiff to

prosecute the writ, and it is only necessary to refer to a standard writer upon the subject to show that the rule as here stated has prevailed in the parent country from a very early period in the history of her jurisprudence to the present time. 1 Chitty's Archbold's Practice, 558 (ed. 1862).

Substance of the rule as there laid down is, that where the execution is issued before the writ of error is sued out, if the sheriff has commenced to levy under the execution, he must proceed to complete what he has begun; but if, when notified of the writ of error, he has not commenced to levy, he cannot obey the command of the execution. 2 Williams' Saunders, 101, h; Perkins v. Woolaston, 1 Salk., 321; Milstead v. Coppard, 5 Term, 272; Kennaird v. Lyall, 7 East, 296; Belshaw v. Marshall, 4 Barn. & Ad., 336; Messiter v. Dinely, 4 Taunt., 280. Even the levy of the execution after the *supersedeas* has commenced to operate is no bar to the writ of error; but the court, on due application, will enjoin the proceedings and set the execution aside, and it has been held that the sheriff and all the parties acting in the matter, are liable in trespass. 2 Williams' Saunders, 101, g; 3 Bac. Abr., Error, H.; Dudley v. Stokes, 2 W. Black., 1183.

Neither the decisions of the courts, therefore, nor text-writers, afford any countenance to the theory that partial satisfaction of the execution operates as an extinguishment of the judgment, or a release of errors, or that it takes away or impairs the jurisdiction of this court. Carefully examined it will be found that the cases cited assert no such doctrine, but that every one of them proceeds upon the ground that where the plaintiff has sued out execution, enforced his judgment, and obtained full satisfaction, there is nothing left on which a writ of error can operate.

Import of the argument is that a writ of error lies only on a final judgment, and that the plaintiff, when he accepts full satisfaction for his judgment, removes the only foundation on which the writ of error can be allowed. Suffice it to say, in answer to that suggestion, that no such question arises in the case, which is all that it is necessary to say upon that subject at the present time. The motion to dismiss is denied.

JUSTICES GRIER, NELSON and SWAYNE dissented, holding that an election to accept and execute the judgment was a *retraxit* of the writ of error.

#### GRISWOLD v. HILL.

(Circuit Court for New York: 2 Paine, 492-501.)

Opinion by THOMPSON, J.

STATEMENT OF FACTS.—This is an application for an order that satisfaction of the judgment recorded in this case be entered of record. The motion is made in behalf of John B. Miller, who is represented as proceeding in the court of chancery of this state to foreclose a mortgage on the real estate of Daniel S. Griswold; and stating, by affidavits, as the grounds upon which the application is made, that Henry D. Sedgwick, administrator of Samuel Hill, had brought an action in the court of common pleas for the city and county of New York, upon the judgment recovered in this court, and had obtained a judgment therein; and had issued executions against the bodies of the above-named defendants, upon which they had been arrested and imprisoned, until discharged from imprisonment, under an act of the legislature of this state, entitled "An act to abolish imprisonment for debt in certain cases," passed 7th

of April, 1819; and it is contended, on the part of Miller, that this arrest and imprisonment of the defendants is, in judgment of law, a satisfaction of the judgment in this court, and that the same ought to be vacated of record.

The two questions that seem to arise are: 1st. Whether the judgment recovered in the court of common pleas is a satisfaction of the judgment in this court; and if not, then, 2d. Whether the arrest and imprisonment of the bodies of the defendants, on the judgment in the common pleas, is to be considered a satisfaction of the judgment in this court.

§ 1344. *Bringing an action on a judgment of the United States circuit court in another court, and obtaining judgment, is not satisfaction of first judgment.*

The first question admits of no doubt. These judgments are debts of the same degree, and the latter cannot be considered an extinguishment of the former. This is a point too well settled to be now called in question. The case of *Mumford v. Stocker*, 1 Cowen, 178, in the supreme court of this state, is in point, as applied to the question now before the court. It is there held that bringing debt on a judgment, and recovering and perfecting judgment thereon in another court, is no satisfaction of the first, and would not warrant the entry of satisfaction of the former judgment, until the latter was in *fact* satisfied; and there is no pretense that the judgment in this court has been paid or in any manner satisfied, unless the arrest and imprisonment of the defendants is, in judgment of law, a satisfaction.

§ 1345. *Whether a ca. sa. is a satisfaction of judgment.*

2. Under the second question, it has been contended that taking out a *capias ad satisfaciendum* was a selection of remedies, and the arrest and imprisonment of the bodies of the defendants amounted to an absolute discharge of the judgment, so far, at all events, as it might operate as a lien upon the property. It is to be observed that the defendants were not discharged from the arrest and imprisonment under the execution by the consent of the plaintiff. Whatever was done was the act of the law. None of the cases, therefore, to be found in the books, which go to show that where a prisoner in execution is discharged by the consent of the creditor, on giving other security to satisfy the judgment, and such security failing, the judgment cannot be again set up. 1 Tenn., 557; 4 Bur., 2482; Ambler, 79; Hobart, 59, apply to the present case. It cannot surely be pretended that as soon as the defendant is arrested upon a *ca. sa.*, satisfaction of the judgment on record may be claimed as matter of right. This would be taking away the very foundation and authority upon which the body was held as satisfaction.

§ 1346. *So long as the debtor is detained in prison the creditor cannot resort to his property, and the judgment is not a lien as against other creditors.*

At law, so long as the body is detained in prison, the creditor cannot resort to the property of the debtor, and the judgment will not be considered a lien as against other creditors. But in an application like the present this court cannot order a modified satisfaction; that is, it cannot direct the judgment to be satisfied and vacated as to one purpose and continue in force as to another. Satisfaction, if entered at all on record, must be entire, and discharge the judgment as to all purposes. Whenever a question arises in the course of a suit between parties touching the priority of lien, or the legal operation of a discharge like the present, the court can give to it the proper and legal effect, so as to preserve the rights of all parties; but this cannot be done in summary proceedings like the present. The judgment creditor ought, therefore, to have been made a party to the proceedings in chancery, and the question then de-

cided how far the judgment was to be considered as discharged. Satisfaction of the judgment entered of record in this court might be considered as satisfaction of the judgment in the common pleas, which is founded upon the judgment here; and if so, would take away all remedy hereafter upon that judgment, which is secured to the plaintiff by the act of the legislature of this state under which the defendants were discharged from imprisonment. Nothing ought to be done here which would in any manner prejudice the right of the parties under that judgment.

The light in which a discharge from imprisonment, like the present case, is considered in this state, appears from the case of *Jackson v. Benedict*, 13 John., 533, where it is held that the lien of the judgment is suspended during the imprisonment on the *ca. ca.*, so that a judgment obtained by another creditor during that time gains a priority of lien on the debtor's property; or that the debtor might sell his property and give to the purchaser a title discharged of the incumbrance of the judgment. That the taking of the body is a discharge of the judgment, except in the cases provided for by the statute. But it is said this court will not notice the state law on this subject, but will give to this discharge the effect it would have by the common law. This is not correct to the extent it has been urged; the common law knows of no such discharges; and if the debtor is discharged from imprisonment against the will and consent of the creditor under a state law, reserving to him certain rights as to future acquired property, it would be going great lengths in this court to consider it a voluntary discharge of the person, and an entire satisfaction of the judgment.

§ 1347. *Satisfaction of a judgment in one court, which is the foundation of a judgment in another court, will not be ordered.*

The common pleas ought not to discharge the judgment obtained in that court; this would be in the face of the statute, which declares that the judgment shall remain valid and effectual against any estate which the debtor so discharged might thereafter obtain. And to order satisfaction to be entered of the judgment in this court, which is the foundation of the judgment in the common pleas, and still leave that judgment unsatisfied, would present an incongruity not called for or to be tolerated. From anything that appears in the affidavits before the court the land covered by the mortgage is now liable to be sold under the judgment in the common pleas. It is not stated where the land lies, or when the title to it was acquired by Griswold. It may have been so acquired since his discharge from imprisonment, and may lie within the reach of an execution on the common pleas judgment, according to the provisions of the sixth section of the act under which he was discharged. This would, of itself, be sufficient to deny the present motion. But I do not rest the decision upon so narrow a ground, as the real facts in the case may be otherwise; but deny the motion upon more general grounds: That the judgment in the common pleas was not an extinguishment of the judgment in this court; that the discharge from imprisonment under the *ca. sa.*, being without the consent and against the will of the plaintiff, and according to the provisions of the state law, did not operate as a satisfaction of the judgment like a voluntary discharge; and that so long as the plaintiff may be entitled to continue in force his judgment in the common pleas, and enforce payment thereof against the future acquired property of the defendant, satisfaction of the judgment in this court, which is the foundation on which that judgment rests, ought not to be entered of record. Motion denied, with costs.

## LEE v. ROGERS.

(Circuit Court for California: 2 Sawyer, 550-570. 1874.)

**STATEMENT OF FACTS.**—Lee had a debt against Coffee in 1856 for \$6,000. In September, 1858, Wheelock recovered judgment against Coffee for \$3,519.92, and Haggin and Tevis had a judgment against him for \$12,000, which Coffee contested and was engaged in litigation to have set aside. In October, 1858, Coffee borrowed \$2,000 from Frenor, with which and other money he paid the Wheelock judgment, but had it assigned to Lester, his hired man. Upon Lee's threatening to sue on his debt, Coffee procured the assignment to him of the Wheelock judgment, and afterwards confessed a judgment in favor of Lee for his debt. Lee proceeded on the Wheelock judgment and caused some of Coffee's land to be sold under it, which was bought in for him by his attorney, in fact, Haynes. Other lands were sold under Lee's own judgment, and no redemption having been made, sheriff's deeds were duly executed. Lee was within the Confederate lines during the war. Frenor having obtained judgment on his debt, caused execution to be issued and levied on the property sold under the Wheelock debt. Frenor filed a bill during the war against Lee and Haynes to have the sale of the land under the Wheelock judgment declared void and the cloud removed from his title, he having bought the land under his own execution. Haynes, acting as agent for Lee, who was sued as a non-resident by publication, agreed with Frenor that the land should be sold and the debt of Frenor paid, and the balance of the money go to Coffee's other creditors. This bill was filed by Lee against the parties to these transactions, disavowing the whole affair, denying that Haynes had any right to agree to any such arrangement for him, and insisting that the Wheelock judgment had been valid in his hands and his title under it good, and for other reasons, which, with further facts, will appear in the opinion of the court.

§ 1348. *A sale under a judgment that has been paid is void.*

Opinion by SAWYER, J.

It is settled without any authority, so far as I am aware to the contrary, that a sale under a judgment after its full payment is absolutely void. And a number of the authorities go so far as to say that such a sale is void under all circumstances, and as to all persons, even though purchasers in good faith for a valuable consideration and without notice. The principle stated in the authorities is, that the judgment is the sole foundation of the sheriff's power to sell and convey; that, if the judgment has been paid at the time of the sale, the sheriff's power is at an end, and he acts without authority; and that the purchaser under a power is chargeable with notice if the power does not exist, and purchases at his peril. The following are the principal authorities upon the point: *Hammett v. Wyman*, 9 Mass., 138; *King v. Goodman*, 16 Mass., 63; *Wood v. Colville*, 2 Hill, 568; *Carpenter v. Stilwell*, 11 N. Y., 69, 70, 76; *Swan v. Saddlemire*, 8 Wend., 681; *Lewis v. Palmer*, 6 Wend., 368; *Craft v. Merrill*, 14 N. Y., 461; *Neilson v. Neilson*, 5 Barb., 565-9; *Cameron v. Irwin*, 5 Hill, 275; *Delaphine v. Hitchcock*, 6 Hill, 17; *Deyo v. Von Valkenberg*, 5 Hill, 246; *Shannon v. Boyd*, 15 John., 443; *Jackson v. Anderson*, 4 Wend., 480; *Mouchat v. Brown*, 3 Rich., 117; *Hunter v. Stevenson*, 1 Hill (S. C.), 415; *State v. Salvers*, 19 Ind., 432; *Skinner v. Lehman's Heirs*, 6 Ohio, 430. Tax sales after payment of the taxes have often been held to be void, even as to innocent purchasers, upon the same principles. *Jackson v. Morse*, 18 John., 441; *Curry v.*

Hinman, 11 Ill., 420; Hunter v. Cochran, 3 Barr, 105; Dougherty v. Dickey, 4 Watts & Serg., 146; Blight v. Banks, 6 Mon., 206.

The Wheelock judgment having been fully paid before its assignment to complainant, and before any sale under it, there can be no doubt that the sale was void. There was no vitality in the execution issued by complainant's direction, and there was no power in the sheriff to sell. This is the legal aspect of the case. But complainant's counsel insists that, at the time of the assignment of the judgment, Coffee led complainant to believe that the judgment was still unsatisfied, and that, conceding the sales to be void at law, he and those claiming under him are in equity estopped from alleging the prior payment of the judgment and the invalidity of the sales under it. Whatever the equitable rights of the parties might be, if the question had arisen between complainant and Coffee alone, I am unable to take that view of the case as it is now presented. Immediately after the assignment of the Wheelock judgment and the confession of judgment in favor of complainant, Coffee confessed another judgment in favor of Frenar, which at once became a lien upon the land, subject only to the rights of complainant then vested — the prior lien of complainant's own judgment. This was before any steps had been taken by complainant to enforce the satisfied Wheelock judgment. Complainant had paid nothing whatever for the Wheelock judgment. He had at that time parted with nothing. He had in no particular placed himself in a worse position than he was in before in consequence of the assignment. At the time he took the assignment, he also took a confession of judgment for the entire amount of his debt, which became a lien on Coffee's lands, and of itself, without reference to the assignment, gave him all the advantage he could by any possibility have obtained by the attachment proceedings, which he forbore, and put him even in a better position than the attachment would have done. The only possible object to be obtained by the assignment of the Wheelock judgment was to get ahead of the Haggin and Tevis judgment, the lien of which had already attached; and even for this purpose no consideration was paid or given.

§ 1349. *Circumstances under which an assignment of a judgment is void.*

Besides, the assignment of the Wheelock judgment was taken under very suspicious circumstances, to say the least. Complainant dealt, not with the judgment creditor, but the judgment debtor. The judgment debtor professed to control the judgment against himself. The judgment debtor, not the judgment creditor, procured, brought to him and delivered the assignment, and without any new consideration. This is a circumstance that ought of itself to have excited the suspicion of a prudent man, and put him upon inquiry, as to how it happened that the debtor controlled the debt apparently due from himself to another. It doubtless would have excited inquiry, had the complainant intended to pay any consideration for the judgment, or had he been actuated by any other motive than a desire to get into a better position than he could occupy by any act of his own by obtaining a preference over a vested lien already attached in favor of Haggin and Tevis. For this purpose it was evidently not desirable to scrutinize the claim assigned to him too closely, as his knowledge would only make him *particeps criminis* in the wrongful act. For any other purpose the assignment was useless, as his own confessed judgment took precedence over all others, and afforded him all the security and all the advantages that the Wheelock judgment could give. The Wheelock



judgment had cost complainant no new consideration — he had parted with nothing — at the time when Freanor's lien attached; and with reference to him he was not, under the circumstances at that time, a *bona fide* purchaser of the judgment for a valuable consideration.

Freanor's right vested at the time his lien attached, and at that time the Wheelock judgment had been fully paid; and, as to him, there was then no matter of estoppel in favor of complainant. Subsequent to that time, no act of either Coffee or the complainant, or both combined, could affect the rights of Freanor.

The subsequent issue of execution upon the Wheelock judgment, the sale thereunder, and the allowing of complainant's lien under his own judgment, so far as not satisfied by other sales to lapse, in no way affected the rights of Freanor already vested. In my judgment, the sale and conveyance to Freanor under his judgment vested in him the legal title to the land. Freanor's title was from that time perfect, and in no respect dependent upon the proceedings to annul the sales under the Wheelock judgment, subsequently taken. The only effect of the decree in the case of *Freanor v. Lee* was to remove a cloud from his title previously acquired. I see no sound reason why, upon the receipt of the sheriff's deed, he could not at once have maintained an action at law upon his title to recover the land against the complainant, or any other party who might have been in possession. See the authorities before cited.

If I am right in this view, then Freanor's deed to Thomas J. Haynes conveyed a complete title, irrespective of the proceedings in equity, in which the sales and conveyances to complainant under the Wheelock judgment were declared void.

§ 1350. *Power of attorney. Incidental powers.*

But, if wrong in this, the view I take upon the other points would lead to the same result. I am by no means clear that the power of attorney to J. W. Haynes is not of itself ample to empower him to authorize Col. Crockett to appear in the case of *Freanor v. Lee*, and consent to the decree entered. It is true that there is no express power to convey land, or authority in so many words to abrogate titles to land. But is not the power assumed by Haynes, under the circumstances of this case, incidental to other powers granted? It does authorize Haynes to collect, demand and receive all money due complainant, to sue therefor, and employ counsel to appear for him as he may deem expedient for the recovery of the same, and for that purpose "to submit to arbitration, and compound the same," and "particularly to prosecute through final process any and all judgments to me belonging, and at the sale under the execution issued thereon to become the purchaser in my name of any lands," etc.

This power of attorney was executed on July 5, 1859, the day on which complainant left California, and four days after the first sale on the Wheelock judgment. The subsequent sale on the second execution issued on that judgment was made by Haynes himself, August 1, in pursuance of this power of attorney and instructions from complainant. The power of attorney then was made in part with special reference to collecting the money from Coffee on these judgments, the object at the time being to obtain money, not land. The title even on the first sale had not yet vested in complainant. He had only got an inchoate, contingent interest, which might be defeated on paying the money and redeeming within the time appointed by law. The subject-matter then upon which this power of attorney was intended to operate was in part

these judgments and executions, and with a view to securing the money due thereon, and to that end the attorney was authorized to act as to him it should seem best for the interest of his principal; to employ counsel in relation thereto, and "to arbitrate or compound the same." The end to be accomplished was to obtain a real substantial satisfaction of these judgments by collecting the money, and the attorney was authorized to bid in the property, in case it should be deemed necessary or advisable, at the contemplated sale; and to receive the redemption money in case it should be paid on the sale already made, and other sales to be made. Haynes proceeded to sell, and there being no other satisfactory bidders he purchased for complainant, the amount being credited on the judgment. It turned out that he got no money, and in the opinion of his counsel no land, and consequently no real, although an apparent, satisfaction of the judgment. He had, as he had good reason to suppose, utterly failed to accomplish his trust — had failed to collect the money or obtain an equivalent, the title having failed through an incurable vice in the judgment through which he sought to make the money. An opportunity occurred, however, by which, through a compromise or compounding of the matter, he could effect the object of the power and still secure payment. Even if he erred as to complainant's real legal rights, there was the strongest reason to fear the loss of the property. It is difficult to see wherein this fails to come within the purview of the power. The contest is not yet ended. The fruits of his efforts are about to slip from his grasp unless he proceeds further, and he does proceed, and through a compromise secures the full amount due his principal. It appears to me that this power to enter into the arrangement by which he ultimately secured complainant's debt is incident to the main power conferred to collect these judgments. But however this may be, this power of attorney was not the only authority Haynes had. It is not necessary that authority should be conferred by a formal technical power of attorney. After these sales had taken place, and after the execution of the sheriff's deeds, Haynes had informed complainant by at least two letters received by him at Washington, before the war broke out, that his title was likely to be contested by Coffee's creditors, on the grounds already discussed; and in one of these letters Frenor was particularly referred to as one who claimed the title under the Wheelock judgment to be void.

In answer to these letters, and in reference to the threatened contest mentioned therein, he writes to Haynes, and in a letter bearing date April 6, 1861, among other things, says: "As to the Oakland property, you must be governed by your own judgment as to its management, and, should it be necessary to go to law, employ whom you think best." In a letter dated April 6, 1861, in answering the letter referring to Frenor, and acknowledging the receipt of Rogers' opinions that complainant's title is invalid, he says, among other things: "As to the clause in my letter of August 22, 1860, you must, as in all cases connected with my Oakland property, be governed by your own judgment, and such legal advice as you may deem expedient." Thus, in addition to the fact that the collection of the demand against Coffee, and the completion of the enforcement of the Wheelock judgment, had been committed to Haynes by his formal power of attorney, dated July 5, 1859, the complainant, after being informed that the title acquired was likely to be attacked by creditors of Coffee, and Frenor especially, and of the opinion of counsel that his title was invalid, further by letter commits the matter to Haynes' discretion, with directions to employ such counsel as he should deem prudent. In one of

these and in other letters he directed him to employ Col. Crockett in all matters relating to his interests where his services could be had.

In my judgment, under this power of attorney, and these subsequent instructions taken together, Mr. Haynes was fully empowered to employ counsel in the case of *Freanor v. Lee*, subsequently commenced; and that both they and the counsel employed were authorized to pursue the course they did, if in their judgment that course was most conducive to the interests of complainant. That they acted in good faith, I see no good reason to doubt. Soon after the last letter from complainant referred to was written the war of rebellion broke out, and complainant resigned his commission in the United States army and withdrew himself within the rebel lines, where he continued in the rebel service during the war, and there was no further opportunity to communicate with him in relation to the matter. Freanor filed his bill against complainant to remove the cloud from his title. Mr. Haynes consulted Col. Crockett, who had been complainant's attorney, and whom complainant had directed him to consult in all matters pertaining to his interest. The facts of the case having been fully investigated, both Col. Crockett and Mr. Rogers, Haynes' own attorney, were of opinion that complainant had no title. Under this hypothesis the action was in no sense necessary to give Freanor a title, for that he already had. A decree would only serve to remove a cloud upon a title already perfect at law. Complainant was without title, and without the means, so far as anything to contrary appears, to satisfy his own judgment from any other source. Upon negotiations between Freanor and Haynes, brought about through Coffee, it was ascertained that by an appearance in Freanor's suit on behalf of complainant, and consenting to a decree removing the cloud, Freanor would consent to a sale of the land, and the payment of the proceeds, first on his own demand against Coffee; secondly, the demand of complainant; and lastly, that the balance should go to Coffee's other creditors. By this means the complainant would get all the money due him, thereby accomplishing the original object of his judgment, while on the other hand he was likely to lose all.

Upon the hypothesis assumed, Freanor was in a position to hold the land himself. Nothing could be done without his assent, and he was not willing to surrender his rights for the benefit of complainant, although he would do it for Coffee's benefit. It was, therefore, in the minds of complainant's agents, and their counsel, only a question whether it was for complainant's interest to permit the cloud to be removed in consideration of getting the moneys due him, or, by refusing to enter into the arrangement, risk losing all. The former course was pursued, and I think wisely. It was such a course as any prudent counsel would be likely to advise, and any prudent business man to adopt, if present and acting for himself. I see no good ground for supposing that there was any fraud perpetrated by any of the parties engaged in this compromise. It matters not whether Freanor in surrendering his right was actuated by motives of friendship for Coffee, or by a due regard for the intrinsic justice of the case. He was in a condition to prescribe terms, and it cannot be denied that he acted with liberality and a due regard to the just claims of all. The arrangement agreed upon was subsequently carried out, and the result was that Freanor obtained his money; complainant his; Coffee's other creditors theirs; and Coffee was partially, if not wholly, relieved from the inconvenience of insolvency. By the conditions of the arrangement under which Freanor conveyed to Thomas J. Haynes, complainant was only entitled

to receive the amount due him. That he received, and after receiving his money he had no further interest in the property; and it was no concern of his what became of it or its proceeds.

I do not think that either Haynes or Crockett, under the circumstances, either exceeded his powers, or improvidently or unwisely exercised them. But if I am mistaken as to the powers of Haynes and Crockett, I think still that the judgment entered upon the appearance and consent of Col. Crockett in *Freanor v. Haynes* is valid as to the vendees of Haynes without actual notice for a valuable consideration. The judgment is in all respects regular on its face. Col. Crockett was an attorney of the court. He appeared as such in the case. It is true, his appearance refers to his authority as derived through Haynes as attorney in fact of complainant, and the written authority to appear is filed and made a part of the judgment roll or record. But the power of attorney to Haynes is not in the record. The record stops with the authority given to Crockett by Haynes. Whether Haynes was duly authorized or not was a question to be determined by the court, in ascertaining whether jurisdiction of the person had been acquired; and it must be conclusively presumed that the court determined the question of Haynes' authority correctly, and upon sufficient evidence. Purchasers were not bound to look beyond the record to see whether the judge committed any error or not. They were entitled to rely on the judgment as they found it. The judgment is regular on its face. It does not of itself affirmatively show any want of authority in Haynes. The judgment is conclusive and cannot be collaterally questioned. *Hahn v. Kelley*, 34 Cal., 391; *Sharp v. Lumley*, 34 Cal., 615-16; *Ryder v. Cohn*, 37 Cal., 89; *Quivey v. Porter*, 37 Cal., 462; *Eitel v. Foote*, 39 Cal., 440; *Mahony v. Middleton*, 41 Cal., 441; *Blasdel v. Kean*, 8 Nev., 308; *Galpin v. Page*, 1 Saw., 309.

A point is made, and pressed with some earnestness, that if the object of the transaction by which the decree in *Freanor v. Lee* was permitted to be taken, and the property conveyed by Freanor to Haynes was to get the title out of complainant in order to protect it from confiscation, the proceedings were all void, because complainant was at the time an alien enemy, and the act, on that ground, unlawful.

This may have been an additional motive in the mind of the counsel of complainant to assent to the arrangement contemplated. But if so, it was merely incidental to the main object, which undoubtedly was to secure the money due to complainant, which was in imminent danger of being lost otherwise than by confiscation. Besides, there is nothing to show that Freanor was in any way influenced by such considerations. The title conveyed and the trusts imposed by him, at least as to parties other than complainant, cannot be affected by the secret motives which actuated the representatives of the latter in consenting to the decree.

#### § 1351. *Rules of law as to actions against belligerents.*

It is further claimed that a valid judgment could not be obtained removing the cloud upon Freanor's title, even if the court could get a service of process in any mode recognized by law, or acquire jurisdiction by means of an appearance made by an attorney duly authorized. The decisions of the supreme court settle that question. In *United States v. Grossmayer*, 9 Wall., 75, it seems to be conceded that "a resident in the territory of one of the belligerents may have in time of war an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in dis-

charge of it, but in such case the agency must have been created before the war began." Now that is the case in hand. Coffee was the judgment debtor of complainant, whose power of attorney to Haynes, and all whose subsequent instructions, verbal and by letter, relating to this business, were given before the war broke out. If Haynes had power to receive the debt or property in discharge of the debt, he must have had power, notwithstanding the war, to enter into these arrangements by means of which the money or property could be received. Besides, at the present term, the supreme court of the United States has held in *Wash. University of Missouri v. Finch*, 18 Wal., 106, that a sale of real estate under a power contained in a trust deed given to secure a debt executed before the late civil war is valid, notwithstanding the fact that the grantors in the trust deed were citizens and residents of the state in insurrection at the time of the sale made while the war was flagrant; and the court say: "But this court has never decided, nor intentionally given expression to the idea, that the property of citizens of the rebel states located in the loyal states was, by the mere existence of the war, exempted from judicial process for debts due to citizens of the loyal states contracted before the war. A proposition like this, which gives an immunity to rebels against the government not accorded to the soldier who is fighting for that government in the very locality where the other resides, must receive the gravest consideration, and be supported by unquestioned weight of authority before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another, an inducement to revolution and insurrection, and it rewards the man who lifts his hands against his government by protection to his property, which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war."

So also, at the present term, in the case of *Masterson v. Howard*, 18 Wall., 99, the court says that the existence of war "does not prevent citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process."

In *McVeigh v. The United States*, 11 Wall., 267, the court holds that an alien enemy may be sued, though he may not have a right to bring suits in our courts, and that when he is sued he has a right to appear and defend; and say: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued." These decisions cover this case. If the citizen may sue to recover a debt in his own courts due from an alien enemy, he may sue to enforce any other right. Frenor having a right of action, as he claims, against Lee to remove a cloud upon his title, filed his bill in equity for that purpose. The statute of California provided for securing service against non-residents in such cases by publication of summons, so that service could have been had in a mode provided by law, as well against an alien enemy as against other non-residents. Section 22 of the California Code of Procedure at the time provided that "after the filing of the complaint, a defendant in an action may appear, answer or demur, whether summons be issued or not, and such appearance, answer or demurrer shall be deemed a waiver of summons." Before the commencement of the war, complainant (Lee) had empowered Haynes to employ counsel in any matters of litigation that might arise touching his interests in California, as we have seen, and upon the filing of Frenor's complaint, Col. Crockett was employed to appear in the case, which he did. This gave the court jurisdiction,

even though complainant at the time was an alien enemy. The other questions have been already discussed.

It ought to be added that I find no offer on the part of the complainant in his bill to return the money he has received under the arrangements which he now seeks to set aside. If he demands the lands after the large increase in value which has accrued during the ten years' growth of the city of Oakland, before the commencement of this action, also enhanced by the improvements put upon them by the parties since the transactions set out have occurred, he certainly ought to offer to return the amount of the debt received by him in lieu of the lands. But asid  from this defect in the bill by failing to offer to do equity, I find no ground for equitable relief. On the contrary, I think, under the circumstances shown, the complainant has abundant reason to be satisfied with the acts of his agents and attorneys, and to congratulate himself that, in his efforts to obtain an undue advantage over prior lienholders, he did not ultimately lose the advantage to which he was justly entitled.

The bill must be dismissed with costs, and it is so ordered.

MAGNIAC v. THOMSON.

(15 Howard, 281-308. 1853.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States for the eastern district of Pennsylvania. The appellants, by their bill in the circuit court, alleged that, being creditors of the appellee in a very large amount of money previously lent and advanced to him, they, in the year 1828, instituted their action for its recovery on the law side of the court, when it was agreed, by writing filed of record, that a judgment should be entered against the appellee as of the 26th of November, 1827, in favor of the appellants, for the sum of \$22,191.71. That this judgment, with a large accumulation of interest, remained unappealed from and unsatisfied, either in whole or in part. That the appellants, after obtaining this judgment, believing that the appellee was possessed of concealed means of satisfying it, and especially that when in a state of insolvency, and with a view of defeating his creditors, he had settled upon his wife a large amount of property, and, as afterwards appeared, made transfers of property to her between the date of the judgment and of the execution thereon, they sued out upon the said judgment a writ of *capias ad satisfaciendum*, returnable to the April term of the court, 1830, and in virtue of that process caused to be taken into actual custody the body of the appellee. That under the exigency of this process and arrest, the appellee would have been compelled to continue in close confinement, or could have obtained his release therefrom solely by the laws of Pennsylvania passed for the relief of insolvent debtors, which laws would have exacted of the appellee an assignment to his creditors of all estate, property, or interests whatsoever, held by himself or by others for him, or unlawfully settled upon his wife; and would have conferred upon him only an immunity against further bodily restraint by reason of the non-payment of such debts as were due and owing from him at the date of such proceedings in insolvency; but that the appellee, being at the time of his arrest a citizen of the state of New Jersey, could not have been admitted to the benefits of the insolvent laws of Pennsylvania until after remaining three months in actual confinement under the writ of *capias ad satisfaciendum*.

That on the 19th of November, 1825, a marriage contract was executed between the appellee and Annis Stockton, his intended wife, and Richard Stockton, the father of said Annis, by which agreement the said Richard Stockton was invested with a large amount of real and personal property in trust for the benefit of the appellee and his intended wife during their joint lives, and if the said appellee should survive his intended wife and have issue by her, in trust for his benefit and for the maintenance and support of his family; and if there should be no child or children of the said marriage, then, after the death of the husband or wife, in trust to convey the property to the survivor in fee-simple.

That the appellee being arrested and in actual custody under the *capias ad satisfaciendum*, sued out as aforesaid, it was then and there agreed in writing, between the appellants and the appellee, that the former should, without prejudice to their rights and remedies against the latter, permit him to be forthwith discharged from custody under the said process, and that the appellee should go to the next session of the circuit court of the United States for the eastern district of Pennsylvania, and on the law side of that court make up an issue with the appellants, to try the question whether the appellee was possessed of the means, either in or out of the marriage settlement, of satisfying the judgment against him; the said issue to be tried without regard to form, or to the time when the jury for the trial whereof should be summoned, the appellee also giving security to abide the result of the trial of said issue. That upon the execution of this agreement, the appellee was released from custody, and the marshal for the eastern district of Pennsylvania, to whom the writ of *capias ad respondendum* was directed, made a return upon the writ that he had taken the body of the appellee into custody, and that he had been discharged by the consent and direction of the appellants. That the trial of the issue, which was provided for in the said agreement, actually took place, and resulted in a verdict by which, so far as concerned the purposes of the said trial, it was found that the appellee had not the means, either in or out of the said marriage settlement, of satisfying the judgment of the appellants.

The bill alleges that by the force and effect of the agreement in writing and of the proceedings in pursuance thereof, the appellee obtained no further or other right or advantage than a present discharge from close custody, and the judgment of a court of competent jurisdiction that he was then possessed of no means, whether in or out of the said marriage settlement, wherewith to satisfy the judgment of the appellants. It further states that, since the judgment upon the issue made up and tried as aforesaid, the wife of the appellee had died without issue, and in consequence of that fact all estate and property vested in the trustee by the marriage settlement, and found by the issue tried as aforesaid to be then protected thereby from the creditors of the appellee, had become the absolute property and estate of the appellee, and had, either by the original trustee in the marriage settlement or by his successor, been conveyed and delivered over to the appellee as his own estate and property, free and clear of any trust whatsoever.

That the trust created by the marriage settlement, and by which the above property comprised therein was adjudged to be protected against creditors, having expired by its own limitation, that property had become liable to the creditors of the appellee, who was bound to a full account of the value thereof and for the satisfaction of the rights and demands of the appellants out of the

same. That the appellants had accordingly applied to the appellee for payment of their judgment, to be made out of the property comprised in and protected by the marriage settlement or out of any other resources at his command, but had been met by a refusal on the part of the appellee, founded not upon his inability to satisfy the just claim of the appellants for money actually loaned, but upon an alleged exemption from all liability resulting from the facts of his having been once arrested under a *capias ad satisfaciendum*, and subsequently released from custody by consent of the appellants. The bill alleges this refusal, and the foundation on which it is placed, to be in direct violation of the written agreement, which explicitly declared that it was made for the accommodation of the appellee, and without any prejudice whatever to arise to the plaintiffs (the appellants') rights, by the defendant's (the appellee's) enlargement. It charges the refusal and objection now interposed to be fraudulent, and made in bad faith, and as such, though it might avail at law to embarrass or prevent the enforcement of the judgment of the appellants, yet that a court of equity should prohibit a resort thereto on account of its unconscientious and fraudulent character. The bill concludes with a prayer that the appellee may be enjoined from setting up, as a discharge from the judgment against him, his release from custody under the circumstances of the case set forth; that an account may be taken of the several subjects of property comprised in the marriage settlement, and of the rents, profits, interest and dividends accruing therefrom, since the death of the wife of the appellee; that satisfaction out of those subjects, of the judgment and claim of the appellants, may be decreed; the bill seeks also for general relief.

To this bill the appellee (the defendant in the circuit court) demurred, assigning, for causes of demurrer, that if the taking into custody of the body of the defendant under the *capias ad satisfaciendum* was a legal discharge of the alleged debt, the complainants are not relievable in equity from the effect thereof for or by reason of any act, matter or thing in the bill alleged; and if the taking into custody was not such a legal discharge, then the complainants have full, adequate and complete remedy at law; and further, that the taking into custody under the said writ was and is to be deemed to have been a discharge and extinction of the judgment of the plaintiffs at law, and a discharge and extinction as well at law as in equity of the debt for which the same was obtained; and the cause coming on to be heard upon the demurrer, the court by its decree sustained the demurrer and dismissed the complainants' bill with costs.

The correctness or incorrectness of the decree thus pronounced are now the subjects of our consideration. Extensive or varied as may be the range of inquiry presented by the bill with respect to what is therein averred to appertain to the merits of this controversy, or to the character of the acts of the parties thereto, the view and the action of this court in relation to that cause must be narrowed necessarily to the questions of law arising upon the demurrer. In approaching these questions there may be propounded as postulates or legal truisms, admitting of no dispute, the following propositions:

§ 1352. *Application of the maxim equitas sequitur legem. Jurisdiction in equity.*

1. That wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable. 2. That wherever there exists at law a complete and ade-



quate power, either for the prosecution of a right or the redressing of a wrong, courts of equity, with the exception of a few cases of concurrent authority, have no jurisdiction or power to act.

§ 1353. *In electing final process the creditor is held to know its nature and consequences in law.*

To the test of these rules the case before us, in common with every appeal to equity, should be brought, and if the effect of such test should prove to be adverse, that effect should be sought in the character of the appeal itself, and not in objections to maxims which judicial experience and wisdom have long established. Recurring now to the history of this cause, let us inquire what was the precise situation of the parties, what their legal rights and responsibilities at the date of the judgment and arising therefrom, what have been their acts and proceedings subsequently to that judgment, and the consequences flowing from their acts to their previous relative position. Upon the recovery of their judgments the appellants had their election of any of the modes of final process known to the courts of law, or they might in equity have impeached the marriage settlement for any vice inherent in its consideration, or for an attempt fraudulently to interpose that settlement between the appellants' judgment and its legal satisfaction. But in their election of any of the forms of final process, the appellants must be held to have known the nature of that process, and the consequences incident to its choice and consummation. To permit an ignorance of these, or in other words an ignorance of the law, to be alleged as the foundation of rights, or in excuse for omissions of duty, or for the privation of rights in others, would lead to the most serious mischief, and would disturb the entire fabric of social order. In choosing the writ of *capias ad satisfaciendum*, therefore, for the enforcement of their judgment, the appellants can derive no benefit from a presumption of ignorance or misapprehension as to the effects of calling into activity this severest and sternest attribute of the law. Such a presumption is wholly inadmissible. They must be affected with knowledge of whatever has been settled as to the nature of this writ, and of whatever regularly follows a resort to its use.

§ 1354. *Effect of taking body of debtor on ca. sa. Exceptions.*

They were bound to know, first, that the service of a *capias ad satisfaciendum*, by taking into custody the body of the debtor, operates a satisfaction of the debt, and for that reason deprives the creditor of all recourse to the lands, or chattels, or property of any description belonging to his debtor. For a doctrine well settled and familiar as is that, it may appear superfluous to cite authorities; but we may refer to some of these, commencing with the early cases of *Foster v. Jackson*, Hob., 52; *Williams v. Cutteris*, Cro. Jac., 136, and *Rolle's Abr.*, 903; and coming down through the more modern authorities of Mr. Justice Blackstone's *Commentaries*, vol. 3, p. 415; 4 Burrow, 2482; 1 T. R., 557; 2 East, 243, and 13 Ves., 193. To these cases might be added many decisions in the courts both of England and in the different states of this country, and, as conclusive of the same doctrine, in this court the case of *Snead v. McCoull*, 12 How., 407. So unbending and stringent was the application of the doctrine maintained by the earlier cases, that prior to the statute of 21st Jac. 1, cap. 24, the death of a debtor whilst charged in execution, an event which rendered the process absolutely unavailable to the creditor, deprived the latter nevertheless of a right to a further execution, the jealousy of the common law denying to him any power beyond that he had exerted in the privation of the personal liberty of the debtor. The statute of James author-

ized the exception of the death of the debtor to this inhibition of the common law, and to this exception has been added the instances of escape or rescue, seemingly upon the ground that in these instances the debtor should not be regarded as legally out of custody.

§ 1355. — *a discharge of the prisoner is an acknowledgment of satisfaction of the judgment, although it be done upon terms and under a stipulation that the creditor's rights shall not be prejudiced.*

The taking of a body under a *capias ad satisfaciendum* being thus held the complete and highest satisfaction of the judgment, it would follow *ex consequenti*, that a discharge of the debtor by the creditor would imply an acknowledgment of such satisfaction, or at any rate would take from that judgment the character of a warrant for resorting to this highest satisfaction in repeated instances for the same demand. But the authorities have not stopped short at a mere technical restraint upon the creditor who may seek to repeat the arrest of the debtor whom he once had in confinement; they have gone the length of declaring that if a person taken on a *capias ad respondendum* was discharged, the plaintiff had no further remedy, because he had determined the choice by this kind of execution, which, affecting a man's liberty, is esteemed the highest and most rigid in the law. See the cases from Hobart, Croke Jac., and Rolle's Abr., before cited. Again, it has been ruled that if the plaintiff consent to the defendant being discharged out of execution, though upon an agreement, he cannot afterwards retake him, although the security given by the defendant on his discharge should be set aside. 4 Burr., 2482; 1 T. R., 557; 2 East, 243. And the lord chancellor, in 13 Ves., 193, uses this explicit language: "It is clear that, by taking the body in execution, the debt is satisfied to all intents and purposes."

Many American cases may be avouched in support of the same doctrine. In the case of *The United States v. Stansbury*, 1 Pet., 573, Chief Justice Marshall says: "It is not denied that at common law the release of a debtor 'whose person is in execution' is a release of the judgment itself. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary release of the person by the creditor."

In the case of *Wendrum v. Parker*, 2 Leigh, 361, it is said by Carr, J., that the "levy of a *ca. sa.* and the release of the debtor from execution by the plaintiff or his agent is an extinguishment of the debt, I have considered as well settled as any point can be by an unbroken series of decisions." And in the case of *Noyes v. Cooper*, 5 Leigh, 186, Brockenbrough, J., says: "It has been undoubtedly established by a series of decisions, that where a defendant in execution has been discharged from imprisonment by direction or with the consent of the plaintiff, no action will ever again lie on the judgment, nor can any new execution issue on that judgment even though the defendant was discharged on an express understanding that he should be liable again to be taken in execution on his failure to comply with the terms on which the discharge took place."

Upon a collation of the authorities applicable to the acts and proceedings of the parties to this controversy at the time, and subsequently to the judgment in favor of the appellants against the appellee, we are led to the following conclusions, namely, that by suing out a *capias ad satisfaciendum* upon their

judgment, and by taking into actual custody the body of the appellee under this process, the appellants had obtained that complete and highest satisfaction of their demand, of which they could be deprived only by the act of God, by operation of law, or by their own acknowledgment, or by a release of their debtor; that by entering into the arrangement stated in the bill, and by discharging the appellee from custody, the appellants have, in all legal intentment, admitted satisfaction of their demand, released the appellee from all liability therefor, and destroyed every effect of their judgment as the foundation of legal rights. Such being our conclusions upon this branch of the case, and the same conclusions being applied in the application of the appellants for equitable interposition, the inquiry here presents itself, whether a court of equity can be called upon to advocate or impair, or in any manner or degree to interfere with clear, ascertained and perfect legal rights?

§ 1356. *Relief in equity in case of imperfect legal title, etc.*

The simple statement of such an inquiry suggests this ready and only correct reply:

Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage; but to abrogate or to assail a perfect and independent legal right, it can have no pretension. In all such instances, equity must follow, or, in other words, be subordinate to, the law. With the view doubtless of giving color to their application, the appellants have intimated (for they can hardly be said to have charged it positively and directly) that the marriage settlement of the appellee was made in fraud of his creditors, and they have directly averred that the refusal of the appellee after the death of his wife to apply the property comprised in that settlement, in satisfaction of the judgment of the appellants, was at once fraudulent, and in direct violation of the agreement in pursuance of which the appellee was discharged from custody. With respect to each of these allegations, however, the appellants are entirely deficient in their proofs, and in the latter, the statement does not accord with the document, that is, the written agreement between the parties on which this averment is founded. No evidence seems to have been adduced upon the trial which took place in pursuance of the agreement to impeach the fairness of the marriage contract; and the absence of any attempt to establish its unfairness, together with the charge of the court to the jury, would seem to exclude the existence, or at that time the belief of the existence, of fraud in the settlement. The agreement entered into at the time of the appellee's release from custody contains no stipulation that he would hold himself liable to another execution dependent on the event that the issue contemplated by that agreement, or that he would consider the judgment as still in full force against him. And if there had been a stipulation of the kind, we have seen that it could not have averted the consequences flowing from the discharge of the appellee from custody; but the only conditions for which the appellee covenanted were that he would make up and try the issue proposed and would abide the result of the trial; with both of which conditions the appellee has literally complied. This charge of fraud, then, even if it could in any aspect of this question have been available, is entirely unsustained.

With regard to the question raised by the demurrer as to the obligation of the appellants to pursue their remedy at law, under the allegation in the bill that such legal remedy had been reserved to them by the terms of the agreement, there can be no doubt, upon the supposition that this remedy remained

unimpaired, that the appellants could not arbitrarily abandon it, and seek the interposition of equity in a matter purely legal. The averment, therefore, by the appellants, of the continuation of their judgment, and of their right to enforce it by execution in all their original force and integrity, is wholly irreconcilable with any known head or principle of equity jurisdiction, and their bill is essentially obnoxious to objection on that account.

We are of the opinion that the decree of the circuit court, sustaining the demurrer to the bill of the appellants (the complainants in the circuit court), is correct, and ought to be, as it is hereby, affirmed with costs.

§ 1357. Release of one joint debtor.—Where a judgment is rendered against several persons jointly, a release of one is a release of the judgment as to all, though the judgment was rendered on a joint and several promissory note. *Collier v. Field*,\* 1 Mont. Ty, 612.

§ 1358. On the trial of a *scire facias* to revive a joint judgment against two or more defendants, a release given to one of them subsequent to the judgment will be a sufficient defense to discharge the others; but, although the obligation on which the judgment is rendered be joint and several, if the judgment be not against all of the parties to such obligation, but against one of them only, he cannot, on the trial of the *scire facias*, avail himself of a release given to his co-obligors in the original contract subsequent to the judgment. *United States v. Thompson*,\* Gilp., 614.

§ 1359. Release by joint owner.—Carlisle, as special agent of the postoffice department, prosecuted to final judgment an action given by the statutes of the United States. The action was for himself as well as for the United States, the avails of the action as to costs belonging to him alone, and as to damages to him and the United States in equal parts. In satisfaction of this judgment the bond of the defendants was taken running to the United States alone. A large part of this bond was paid, and of which sum the costs belonging to Carlisle were paid, and the balance divided between him and the United States. Suit was brought upon this bond and a judgment recovered for the balance due on it. The United States, by its officer having control of the suit, entered satisfaction of this judgment without payment. A motion by Carlisle to set aside this entry of satisfaction was denied upon the ground that ownership in this judgment being joint, the release by one joint owner was valid. *United States v. Bacon*,\* 14 Blatch., 279.

§ 1360. By levy.—A levy is said to be a satisfaction of the debt, if the property be of sufficient amount. And this is said to be the case, though the property should be wasted by the negligence of the officer levying. *Starr v. Moore*, 3 McL., 354.

§ 1361. A levy on personal property, shown by the officer's return to be of sufficient value to pay the debt, discharges the defendant, and the plaintiff must look to the officer for his money. *Campbell v. Pope*, Hemp., 271.

§ 1362. Satisfaction without consideration.—The holder of judgment liens against a railroad purchased the road at a sale under a prior deed of trust, paying less than the debt secured by such trust deed. Considering himself the owner of the road, and in order to clear the title, he marked his judgments satisfied, although he had been paid nothing on them. The purchaser then organized a new company. But the sale was subsequently set aside and annulled in a suit by the old company against the new. On a bill by the purchaser to have his judgments set up and declared liens on the road as they were before, it was held that he was entitled to this relief. *Hay v. Railroad Co.*,\* 4 Hughes, 327.

§ 1363. Prima facie proof of consideration.—The production of a written acknowledgment of satisfaction of a judgment is sufficient *prima facie* to authorize a satisfaction upon motion by the court. It devolves upon the judgment creditor to show that the acknowledgment of satisfaction was founded upon an insufficient consideration. *Cavender v. Grove*, 4 Biss., 269 (§§ 1319-22).

§ 1364. Purchase at judicial sale by judgment creditor.—Where, at judicial sale, plaintiff buys the property for the amount of the judgment, interest and costs, the judgment is thereby satisfied. *Walker v. Powers*, 14 Otto, 245.

§ 1365. Attachment not satisfaction.—A seizure of personal property, under an order of attachment issued during the pendency of an action, is not necessarily a satisfaction of the judgment when afterwards obtained. *Maxwell v. Stewart*,\* 22 Wall., 77.

§ 1366. Agreement to receive less than due, inoperative.—Payment of a less sum than the amount due on a judgment cannot operate as a full satisfaction thereof, although it is agreed between the parties at the time that it shall so operate. *Cavender v. Grove*, 4 Biss., 269 (§§ 1319-22); *The Lulie D.*, 4 Biss., 249.

§ 1367. **Refusal by plaintiff to give indemnity.**— Judgment on an award was that the defendant pay so much on receiving from the plaintiff an indemnity against certain claims. Plaintiff refused to give the indemnity; and on the defendant paying more claims, against which he was to be indemnified, than the amount of the judgment, the court ordered satisfaction to be entered on the judgment. *Medford v. Dorsey*, 2 Wash., 467.

§ 1368. **That a prior execution has been issued upon a judgment and levied upon land which has not been sold for want of bidders does not amount to a satisfaction of the judgment, and render a sale of other land under a subsequent execution void.** *Morton v. Smith*, \* 2 Dill., 816.

§ 1369. **Where land is conveyed in part satisfaction of a judgment it is to be credited upon the judgment according to its value at the time it is conveyed, and not at the price paid for it by the debtor.** *United States v. Thompson*, \* Gilp., 614.

§ 1370. **Court may inquire into claim of entry of satisfaction.**— No decree or judgment can be entered against the government of the United States without its consent, nor can judgment rendered in its favor be enjoined. But the court which rendered the judgment having power to direct credits to be given on it, and to order satisfaction to be entered thereon, may inquire into the grounds upon which an entry of satisfaction is claimed, and may direct the execution to be stayed until such an investigation shall be made. *United States v. McLeMORE*, 4 How., 286.

§ 1371. **Satisfaction of a judgment on a judgment.**— A judgment creditor who had obtained a judgment in New York and sued on it in a court in another state and obtained judgment cannot maintain an action on the second judgment after joining, on his first judgment, in insolvency proceedings in New York in which the debtor was discharged. The second judgment was dependent on the first, and the first being satisfied, it would have been the duty of the second court to have canceled the judgment on proof of that fact. *Brest v. Smith*, 5 Biss., 62.

§ 1372. **What may be alleged in support of motion.**— On a motion to enter satisfaction of a judgment nothing can be heard in support of it which might have been set up as a defense to the action in which it was rendered. But if such a defense is omitted to be pleaded to the action, and it might be the subject of a cross-action, the matter may, by agreement of the parties, furnish a sufficient consideration for a contract between them to satisfy the judgment. *Cavender v. Grove*, 4 Biss., 269 (§§ 1819-22).

§ 1373. **Imprisonment under a ca. sa. is a satisfaction of the debt as to the defendant.** *Parker v. United States*, Pet. C. C., 262.

§ 1374. **A judgment is not satisfied by taking the body of the defendant on a ca. sa.** *Dowlin v. Standifer*, Hemp., 290.

§ 1375. **Where one having arrested his debtor defendant on a ca. sa. sets him at liberty on certain terms, at his instance, it being "expressly acknowledged" by the defendant that this is done "for his accommodation, without any prejudice whatever to arise to the plaintiff's right by the enlargement" as aforesaid, "or otherwise howsoever," the debt is paid at law.** No further execution of any sort can be issued thereafter. *Magniac v. Thompson*, 2 Wall. Jr., 209.

§ 1376. **At common law the release of the debtor whose person is in execution is a release of the judgment itself.** *United States v. Stansbury*, 1 Pet., 573.

## XII. CONFESSION OF JUDGMENT.

### SUMMARY — *Entry in vacation*, §§ 1377, 1378.

§ 1377. **A positive statute is necessary to authorize an entry of a judgment in vacation, and then it is only a nominal judgment or statute lien.** And to make a judgment entered in vacation valid against the defendant, all the forms prescribed by law must be substantially complied with. *Bonnell v. Weaver*, § 1879.

§ 1378. **One who confesses a judgment which is entered in vacation, without a compliance with the statutes authorizing judgments to be entered in vacation, may move to have the judgment vacated, and the court can then proceed to enter judgment upon the confession and to issue execution.** *Ibid.*

[NOTES.— See §§ 1380-1404.]

## BONNELL v. WEAVER.

(Circuit Court for Wisconsin: 5 Bissell, 23-25. 1856.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—These three suits were commenced by attachment, with affidavits annexed, and before the marshal had taken an inventory the defendant gave to the plaintiffs in such case a cognovit, whereby he confessed the debt and consented that a judgment might be entered immediately and an execution be issued upon the judgment. There was no express authority from the defendant to the clerk to enter the judgments in vacation, but they were entered in vacation, and executions were issued and served by seizing the defendant's goods in store. The defendant has moved the court that the entry of judgments in these cases be vacated and the executions set aside for the reason that the judgments are irregular and void. The reason is not specified, but we understand that these judgments were entered on the docket in vacation without lawful authority.

Revised Statutes, 534, 535 and 536, are copied from the statutes of the state of New York, called the Revised Statutes of that state, in 1829. Section 13 provides that "Judgments may be entered in vacation as in term upon a plea of confession signed by an attorney of such court, although there be no suit then pending between the parties, . . . if the following provisions be complied with, and not otherwise." Then the provisions are specified, which are not pursued in these cases. The reading of this section is this: "Although there be no suit then pending between the parties, judgments may be entered in the supreme or in any court of record in vacation as in term upon a plea of confession signed by the attorney, if the following provisions be complied with, and not otherwise."

§ 1379. *Judgments of the federal courts cannot be entered in vacation, unless in pursuance of a positive statute.*

The federal courts, in pursuance of acts of congress, recognize the laws of the states in regard to the entering and recording of judgments and these liens. They are rules of property which the federal courts must observe. It would work great confusion to have one set of laws regulating property as to its title in this court and another in the state court. We then pursue in this particular the statutes of the state.

A judgment is the sentence of the law pronounced by the court; but the court can only be held in term time as may be prescribed by law, and for the purpose of entering judgments has no existence in vacation; consequently, a judgment cannot be entered in vacation unless in pursuance of a positive statute, whose provisions must be complied with.

Under the old system in New York judgments were entered in vacation upon cognovit, but whether before or after the first term does not appear. *Arden v. Rice*, 1 Caine, 498; *Hogeboom v. Genet*, 6 Johns., 325. I have not been able to find a case since the Revised Statutes of 1829, but in 1840 (*Laws of 1840*, p. 334, § 23) it is provided that "judgments may be entered and perfected at any time in term or vacation." We have no such provision in this state. In England, judgments may be perfected after the term, even in vacation, and may be entered even without declaration.

The following points are ruled here:

1. No statute is necessary to enable the court to enter a judgment, although

the court will follow the forms of practice prescribed by statute as the rules of this court in the absence of a statute.

2. As the court is only in legal existence to exercise judicial power at such times as may be prescribed by law, a positive statute is necessary to authorize an entry of a judgment in vacation. And then it is only a nominal judgment or statute lien.

3. To make a judgment entered in vacation valid against the defendant, all the forms prescribed by law must be substantially complied with.

4. The cognovits in these cases are not in compliance with the provisions of the statute. They are not signed by an attorney of this court. The authority for confessing such judgments was not in any proper instrument, nor was the authority produced to the officer signing the judgment.

5. A court of law cannot substitute equivalents for positive statutory provisions when the statute directs that these provisions shall be observed, and not otherwise.

6. These cognovits are confessions of the debt and an authority to the court to enter judgment immediately; that is, whenever they are brought into court. They are no more than if the defendant came into court in his own proper person and acknowledged judgment *ore tenus*.

7. It is competent to the defendant to move that these judgments be vacated.

8. The court can now proceed after the vacation of the judgment to render judgments upon those cognovits and to issue executions.

9. The court cannot now determine whether these plaintiffs have any rights by reason of the verbal arrangements stated in the affidavit of Mr. Van Dyke, to the exclusion of the other execution creditors. But if such right be claimed, it will have to be ascertained after the proceeds of sale are brought into court for distribution, which may be done by a rule upon the marshal, or the marshal may bring the money in of his own accord and ask the court to distribute it.

10. These three judgments will now be vacated and the execution set aside.

11. If judgments be now entered and executions be issued, there need not be a new advertisement, as there are other executions in the marshal's hands upon which the property seized has been advertised for sale.

§ 1880. Release of errors.—In Virginia a confession of judgment by the plaintiff in error is a release of errors. *Mandeville v. Haley*,\* 1 Pet., 136.

§ 1881. In Virginia a judgment on confession is equal to a release of errors, and the United States circuit court will not grant a writ of error *coram vobis* upon the suggestion of the death of the plaintiff, where the justice of the case does not seem to require it; nor will they quash a *fiat facias* issued in favor of the plaintiff's administrator upon a suggestion of the death of the administrator after the award of execution. *Catlett v. Cooke*, 2 Cr. C. C., 9.

§ 1882. Entry in judgment book.—Where a statute provided that a judgment by confession should be entered in the judgment book, a sale under a judgment not so entered was void. *King v. French*,\* 2 Saw., 441.

§ 1883. Waiver of process.—A power of attorney to confess judgment is a waiver of process and authorizes the entry of a judgment without service. *Varnum v. Runion*,\* 1 McL., 413.

§ 1884. Under bankrupt law.—A judgment confessed within the two months before filing the petition, where the bankrupts had broken up their business, is fraudulent, and also the proceedings under it. *McLean v. Lafayette Bank*, 3 McL., 587.

§ 1885. The bankrupt law, being supreme, overrides all state legislation, and, therefore, judgments confessed in contravention of the act are void, and not liens on the bankrupt's property, although they may be valid by the state laws. *Atkinson v. Purdy*, Crabbe, 551.

§ 1886. A judgment by confession, taken more than six months before the filing of the peti-

tion in bankruptcy, is not void though taken in fraud of the bankrupt act. *In re Fuller*, 1 Saw., 243.

§ 1387. A warrant of attorney to confess a judgment, the defendant being insolvent, executed within sixty days preceding the filing of the petition, by the bankrupt, cannot authorize the entry of a judgment, and an execution issued on such judgment, though levied, creates no lien upon the property levied on. *McLean v. Lafayette Bank*, 3 McL., 185.

§ 1388. In fraud of creditors.—A judgment by confession, taken and given with the deliberate purpose of defrauding creditors of the judgment debtor, will be set aside, independently of the question of the *bona fides* of the judgment creditors' claim. *Smith v. Schwed*,\* 9 Fed. R., 483.

§ 1389. For fraudulent purpose.—A judgment by confession, given for a fraudulent purpose, is not binding on the party sought to be defrauded. *Currie v. Jordan*, 4 Biss., 518.

§ 1390. Preferences.—An administrator has a right at law to give a preference to a creditor by confessing a judgment, and a court of equity will not interfere by injunction. *Wilson v. Wilson's Adm'r*, 1 Cr. C. C., 255.

§ 1391. Without knowledge of beneficiary.—An executor, who was also a devisee under the will, in order to secure the portions of the other devisees, who were minors, confessed judgment on a promissory note, in favor of two persons, without their knowledge. *Held*, that such judgment was valid. *Bank of Georgia v. Higginbottom*, 9 Pet., 48.

§ 1392. Conclusiveness.—In general every judgment of a court having jurisdiction over the parties and subject-matter in controversy is binding upon those parties and their privies until regularly reversed, and, though founded on an erroneous view of the matter in controversy, is conclusive on every other court; therefore, the United States court for the eastern district of Pennsylvania, in a suit by the assignee of a bankrupt, refused to examine into the validity of a judgment confessed by the bankrupt in a state court, the jurisdiction of which was not denied. *Atkinson v. Purdy, Crabbe*, 551.

§ 1393. Relief against judgments.—Upon the same principle upon which equity grants relief after voluntary payment of money, it will protect against a confession of judgment. Thus where a promisor confessed judgment upon two promissory notes, one given to secure a gambling debt, and the other upon a usurious consideration, and afterwards became bankrupt, upon bill filed by his trustee for relief against the execution issued upon such judgment, *held*, that equity could relieve the same as if the illegal claims had been paid voluntarily and no judgment had been rendered. *Thomas v. Watson*, Taney, 297.

§ 1394. Where both parties were residents of the same state, a judgment entered on a warrant of attorney will be set aside. *Byrne v. Holt*,\* 2 Wash., 282.

§ 1395. Extent of warrant of attorney.—Where one judgment is confessed upon a warrant of attorney to confess judgment, the warrant then becomes *functus officio*; and a second judgment cannot be entered upon it. That the warrant gives the attorney authority to confess a judgment or judgments will not authorize the entry of a second judgment. The plural form of expression only applies to an imperfect judgment, which might be set aside or reversed for error, and does not contemplate the existence of two valid and subsisting judgments at the same time and upon the same bond. *Fairchild v. Camac*,\* 3 Wash., 558.

§ 1396. Before maturity of instrument.—A judgment by confession entered upon a bond with power of attorney to confess judgment and before the bond is due will be set aside. The defendant gave to the plaintiff such a bond in November, 1846, for the payment of a certain sum one year from date. The power gave the attorney authority to appear in any action brought or to be brought against the defendant at the suit of the plaintiff on said obligation as of any term or time, past, present or any other subsequent term or time, and to confess judgment. In December, 1846, a judgment was confessed by the attorney upon this warrant. Upon motion the judgment was set aside because entered before the bond was due and without an appearance by the defendant. *Smith v. Hartwell*,\* 4 McL., 208.

§ 1397. Within what time.—A defendant arrested to appear at the next term cannot come in and confess judgment at this term. *Askew v. Smith*, 1 Cr. C. C., 159.

§ 1398. Judgment cannot be confessed before the return term of the writ. *Hoden v. Perry*, 1 Cr. C. C., 285.

§ 1399. Insufficient statement of facts.—Under the code of Oregon a judgment on confession is void for the want of a sufficient statement of facts only as against creditors who have acquired a lien on the property of the debtor. *In re Fuller*, 1 Saw., 243.

§ 1400. Without a declaration.—A defendant may come in and confess judgment for the amount of the damage laid in the writ, though no declaration is filed. *McNeil v. Cannon*,\* 1 Cr. C. C., 127.

§ 1401. Authentication.—Under the statute of California (Stat. 1850, 454, sec. 298) a judgment by confession not authenticated by the debtor's signature is void. The signature of the defendant's attorney is not sufficient. *French v. Edwards*, 5 Saw., 266.



§ 1402. Where there were three defendants, and the judgment was authenticated by two personally and by the attorney of the other, it was held the two personally signing only consented thereby that judgment might be entered against all, and that as the third could not consent by his attorney the judgment was wholly void as to all the defendants. *Ibid.*

§ 1403. Judgment vacated — Revivor of cause of action.— Where notes are merged in a judgment rendered on confession, and the judgment is vacated on account of the want of authority of the defendant confessing it to bind the other defendants, and on account of the absorption by a previous mortgage of the goods assigned to secure the judgment, the confession and assignment being parts of one transaction, the cause of action upon the original notes revives. *Clark v. Bowen*, \* 22 How., 270.

§ 1404. To operate as a supersedeas.— The confession of judgment in Maryland in order to operate as a *supersedeas* must be made in the very words of the statute of Maryland (1791, ch. 67); and an execution issued upon a judgment confessed in any other form by way of a *supersedeas* is null and void. *Plant v. Holtzman*, 4 Cr. C. C., 441.

### XIII. REVIVOR.

§ 1405. When necessary on change of parties in Maryland.— Under the law of Maryland prior to the act of 1862, an execution might issue at any time within three years from the date of the judgment where there had been no "change" of parties by death or marriage. Under this law it was always held necessary to have a *scire facias* if there was a change of parties within three years. The act of 1862 enacted that in case of the death of the plaintiff the executor or administrator might be made a party and have execution as if no such death occurred. Under this act no *scire facias* was necessary upon the death of the plaintiff. But an act made in its stead in 1874 declared that executions might issue on any judgment at any time within twelve years from the date of such judgment when no "discharge" of parties had taken place by death or marriage; and omitted entirely the summary method of making new parties provided by the act of 1862. It is held in this case that this act repealed the act of 1862, and under it a *scire facias* is necessary upon the death of the plaintiff. *Brown v. Chesapeake and Ohio Canal Co.*, \* 4 Hughes, 584; 4 Fed. R., 770.

§ 1406. *Scire facias* need not show amount of judgment.— The judgment upon a *scire facias* to revive a judgment is not for a certain sum of money then ascertained and entered up. Although for some purposes it is called a new judgment, it is simply a judgment that the plaintiff have execution against the defendant for the amount of the original judgment and costs, and the additional costs then by the court adjudged. It is no objection, therefore, to a writ of *scire facias* on a judgment rendered on a former *scire facias*, that it does not show for what specific amount said judgment on said former *scire facias* was rendered, where it recites the original judgment and the fact that it was considered on the former *scire facias* that the plaintiff have execution for the original judgment and costs and for the additional costs sustained by the delay of the execution of the judgment. *Ibid.*

§ 1407. Right of revivor, how far limited by act of Virginia.— It seems that the fifth section of the act of Virginia of 1792, which limits the rights of reviving judgments by *scire facias* or action of debt to the period of ten years, applies as well to those judgments which had been rendered at the time of the passage of the act as to those rendered afterwards; but if a creditor who had obtained a judgment against his debtor in the life-time of the latter has been employed in pursuing the personal estate in the hands of the executor, or if a court of equity has enjoined him from exhausting the personal estate, and so the delay has been produced, the act ought not to be so construed as to bar a *scire facias* against the heir, after the lapse of ten years. *Alston v. Munford*, 1 Marsh., 266.

§ 1408. The English statute of West. 2, 18 Edw. 1, ch. 45, which gives a *scire facias* to revive judgments in personal actions, is still in force in Virginia for that purpose. *Offutt's Ex'r v. Henderson*, 2 Cr. C. C., 553.

§ 1409. What parties necessary.— Where a judgment creditor proceeds to enforce his lien on the realty, and for that purpose it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land a party to the proceedings. The rule is not limited to a revival of the judgment after the death of the debtor. *Jackson v. Bank of United States*, \* 5 Cr. C. C., 1.

§ 1410. Under the laws of Pennsylvania the lands of the debtor as well as his personal estate may be taken in execution and sold under a judgment against his executor, and a plaintiff suing out a *scire facias* against an executor to revive a judgment recovered against the testator is under no necessity to sue out a *scire facias* against the heirs and terre-tenants of the debtor in order to charge the lands of which they are seized. The proper remedy for those persons, where they may be aggrieved by an execution levied on their lands, is by

*audita querela*, or more properly by obtaining a rule of court to show cause. *Wilson v. Watson*,\* Pet. C. C., 269.

§ 1411. **Right to issue execution does not preclude *scire facias*.**—The writ of *scire facias* was granted by the statute of Westminster 2d, in order that the plaintiff in a personal action, if he did not have execution within a year and a day, might not be obliged to bring a new action on his judgment. This remedy was considered as an addition to and not as a substitute for the old remedy, and the plaintiff might still bring the action on the judgment, or sue out the writ, even if he had issued execution within a year and a day. It is therefore held that a *scire facias* may issue although the plaintiff may have a right to issue execution without it. *Brown v. Chesapeake & Ohio Canal Co.*,\* 4 Hughes, 584; 4 Fed. R., 770.

§ 1412. **After expiration of a year revivor necessary.**—A decree in a chancery attachment, after the expiration of the year and day, must be revived by *scire facias* before execution can be had. *Veitch v. Farmers' Bank of Alexandria*, 3 Cr. C. C., 81.

§ 1413. **After the year has elapsed, execution cannot issue, in the District of Columbia, upon a judgment in Maryland, without a *scire facias*, notwithstanding the thirteenth section of the act of congress of February 27, 1801.** *McDonald v. White*, 1 Cr. C. C., 149.

§ 1414. **A *capias ad satisfaciendum* returned *non est inventus* does not preserve the lien of a judgment without a *scire facias* within five years from its entry.** *Thompson v. Phillips*, 1 Bald., 246.

§ 1415. **Levy and condemnation sufficient without revivor in Pennsylvania.**—In Pennsylvania the taking out of a *feri facias* and levying it on the lands of the defendant and condemning them by an inquest are sufficient without a *scire facias* to keep the judgment alive and preserve the lien even as against junior judgments. *United States v. Mechanics' Bank*,\* Gilp., 51.

§ 1416. **New execution, when given without revivor.**—Where an execution has been issued within the year and day, and shall have been returned by the marshal, it is not necessary to renew the execution from year to year to keep alive the judgment, but the plaintiff may have a new execution at any time without a *scire facias*. But where an execution is ordered to be made out and lie in the clerk's office, and shall not have been delivered to the marshal and returned, the order for the renewal of the execution must be made within the year and day after the last order for renewal, or the judgment must be revived by *scire facias*. *Johnson v. Glover*,\* 2 Cr. C. C., 678.

§ 1417. **Revivor in favor of surety.**—A judgment lien cannot be revived in favor of one of the defendants who was surety, after satisfaction of the judgment, to the prejudice of a third party. *McLean v. Lafayette Bank*, 3 McL., 587.

§ 1418. **Against surety after death of principal.**—A judgment upon a forfeited recognizance of bail is not a judgment *nisi*, but it is absolute, and a surety in case of joint judgment cannot be discharged from his liability as bail on the ground that his principal had died before the service of the *scire facias*. *United States v. Winsted*, 4 Hughes, 464.

§ 1419. **Against representatives.**—Where the judgment upon a forfeited recognizance of bail given by a principal and his sureties is joint, and the principal dies before the service of the *scire facias*, a *scire facias* will issue to the representatives of the deceased principal, upon the return of which the court will consider the question of remitting or modifying the forfeiture in accordance with the provisions of the statute. *Ibid*.

§ 1420. **Priority of lien of mortgage.**—If, after judgment and levy on lands, the judgment debtor executes a mortgage, and the judgment becomes dormant, the revival of the judgment does not operate to the prejudice of the mortgage lien. In such a case the mortgage becomes prior. *Tracy v. Tracy*,\* 5 McL., 456.

§ 1421. **Evidence.**—On a *scire facias* to revive a judgment, evidence affecting the merits of the original judgment cannot be given. *Snyder v. Brachen*,\* 5 Biss., 60.

§ 1422. **Defenses to *scire facias*.**—On a *scire facias* to revive a judgment, the defendant can avail himself only of such matters of defense as have occurred since the judgment was rendered against him. Any defense within his knowledge antecedent to the judgment should have been pleaded before the judgment was rendered. *United States v. Thompson*,\* Gilp., 614.

§ 1423. **Where the statute of limitations has run against a judgment, it may be pleaded to a *sci. fa.* to revive the judgment.** *Simpson v. Lassalle*, 4 McL., 352.

§ 1424. — **second *scire facias*.**—On a second *scire facias* to revive a judgment, nothing can be pleaded in bar which was not pleaded to the original *scire facias*. *Wilson v. Hurst*, Pet. C. C., 441.

## XIV. EXECUTIONS.

[See WRITS; SALES.]

## 1. In General.

**SUMMARY**—*Power of congress to regulate, §§ 1425, 1432.*—*Under section 14, act of 1789, § 1426.*—*Effect of act making state laws rules of decision, § 1427.*—*Act of 1789, as to forms and modes of process, construed, § 1428.*—*Act of 1792, adopting state laws, §§ 1429, 1430.*—*As to subsequent state laws, §§ 1431, 1436.*—*Congress has full power over executions in federal courts, § 1432.*—*State law as to sale of property, § 1433.*—*Federal courts may alter form so as to levy on land, §§ 1434-1436.*—*Form of process not governed by section 34 of judiciary act, § 1437.*—*State law as to time within which execution may issue, § 1438.*—*Second execution in Virginia, § 1439.*—*Effect of act of 1828, § 1440.*—*Cases in which state laws do not apply, § 1441.*—*From what rulings a writ of error will lie, § 1442.*—*Execution erroneously awarded may be quashed, § 1443.*—*Injunction does not operate as a supersedeas, § 1444.*—*A supersedeas must come before a levy, § 1445.*—*Death of defendant, §§ 1447-1449.*—*In attachment cases, § 1450.*—*Purchaser not protected if execution is void, § 1451.*

§ 1425. Congress has power under the constitution to pass laws regulating executions issued on judgments of the courts of the United States, and the conduct of the officers in proceeding upon them: *Wayman v. Southard*, §§ 1452-60.

§ 1426. The fourteenth section of the judiciary act of 1789 gives the courts of the United States power to issue executions on their judgments. *Ibid.*

§ 1427. The thirty-fourth section of the judiciary act of 1789, enacting "that the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," furnishes no rule for the courts of the United States, or their officers, in issuing and serving executions. *Ibid.*

§ 1428. The act of congress of 1789 to "regulate processes in the courts of the United States," providing that "the forms of writs and executions, except their style and modes of process, in the circuit and district courts in suits at common law, shall be the same in each state respectively as are now used in the supreme courts of the same," so far as it respects the writ is confined to form; but the words "modes of process" were intended to mean the time and circumstances under which the writ might issue, and the conduct of the officer while in possession of the execution. *Ibid.*

§ 1429. The process act of 1792 adopts the laws of the several states as they stood in 1789, as the rule by which the officers of the federal courts are to be governed in the service of executions issuing out of those courts. But it also gives the courts power to make such alterations and additions in this respect as they deem expedient, and this delegation of power is constitutional. *Ibid.*

§ 1430. The process act of 1792, adopting the state laws as rules for the courts of the United States in issuing and serving executions, adopted such laws as existed in 1789, and not those which might be passed or might have been passed afterwards; and the laws of Kentucky, passed subsequently to that date, which provide that the plaintiff shall direct the officer that bank notes of the Bank of Kentucky may be received in payment, or the defendant may replevy the debt for two years, do not apply to an execution issued out of a federal court. *Ibid.*

§ 1431. The process acts of 1789 and 1792, which adopted the execution laws of the respective states as they stood in 1789, did not adopt any subsequent changes in those laws, and no subsequent changes are obligatory upon the federal courts. *Ross v. Duval*, §§ 1467-72.

§ 1432. Congress has uncontrollable power to regulate the proceedings on executions issued on judgments of the courts of the United States, and to direct the mode and manner, and out of what property of the debtor, satisfaction may be obtained. *Bank of United States v. Halstead*, §§ 1461-66.

§ 1433. The statute of Kentucky of the 21st of December, 1831, which prohibits the sale of real estate taken under execution for less than three-fourths of its appraised value, without the consent of the owner, does not apply in executing a judgment of a court of the United States in that district. *Ibid.*

§ 1434. The circuit courts of the United States may, under the laws of congress, alter the form of process of execution which was in use in the supreme courts of the states in the year 1789, so as to levy upon whatever property is made subject to like process from the state courts. Thus where land is made the subject of execution by state laws, the courts of the United States may levy upon lands, and in doing so are not restricted in any manner by state laws

regulating the proceeding, as by requiring the land to sell for a certain proportion of its appraised value. *Ibid.*

§ 1485. Executions are among the writs authorized by the fourteenth section of the judiciary act giving the courts of the United States power to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. This power includes executions authorized by state statutes as well as those authorized by the common law. *Ibid.*

§ 1486. Under this act the courts were not limited to the form of executions used by the state courts. The temporary act of September 19, 1789, however, imposed such a limitation, until the permanent act of May 8, 1792, which adopted the state process as it was in 1789, with power in the United States courts to make such alterations and additions as the ends of justice required. This act did not adopt the prospective changes which might be made by state laws upon the subject. *Ibid.*

§ 1437. The thirty-fourth section of the judiciary act has no application to the practice of the courts of the United States so as in any manner to govern the form of the process of execution. *Ibid.*

§ 1488. A state law limiting the time within which an execution may issue on a judgment is not an act to regulate process within the meaning of the process acts of 1789 and 1792, but is a rule of property, and binding on the federal courts by virtue of the thirty-fourth section of the judiciary act. *Ross v. Duval*, §§ 1467-72.

§ 1489. Under the law of Virginia of 1789, where an execution is issued on a judgment within the year, on which no return is made, no other execution can issue after the lapse of ten years from the date of the judgment. *Ibid.*

§ 1440. The third section of the process act of 1826, providing that "writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state respectively as are now used in the courts of such state," operates on all executions issued subsequent to its passage without reference to the time when the judgments were rendered. *Ibid.*

§ 1441. Although the laws of the United States have adopted the forms of executions and other process authorized and used under state laws, subject to such alterations and additions as may be made by the courts of the United States, yet such executions issuing from the courts of the United States, in virtue of these provisions, are not controlled or controllable in their general operation and effect by any collateral regulations and restrictions which the state laws have imposed upon the state courts. Such regulations and restrictions have no efficacy in the courts of the United States, unless adopted by them. A state law making an injunction in equity a *supersedeas* of an execution at law does not therefore govern executions issued from the federal courts. *Boyle v. Zacharie*, §§ 1473-77.

§ 1442. A writ of error lies to an erroneous award of execution, not warranted by the judgment, or to correct erroneous proceedings under the execution, but not to the refusal of a mere motion to quash an execution or the auxiliary process of *venditioni exponas*. The refusal to grant such a motion is not a judgment in the sense of the common law. *Ibid.*

§ 1443. In modern times courts of law will often interfere by summary proceedings on motion, and quash an execution erroneously awarded, where a writ of error or other remedy, such as a writ of *audita querela*, would clearly lie; but in such cases the motion is not granted *ex debito justitiæ*, but in the exercise of a sound discretion by the court. *Ibid.*

§ 1444. An injunction in equity does not operate as a *supersedeas* of an execution at law. *Ibid.*

§ 1445. A *supersedeas*, in order to stay proceedings on an execution, must come before a levy is made under the execution. If it comes afterwards, the sheriff may proceed upon a writ of *venditioni exponas* to sell the goods. *Ibid.*

§ 1446. A forthcoming bond given under an execution issued on a judgment which has expired from lapse of time is void. *Ross v. Duval*, §§ 1467-72.

§ 1447. Although according to the law of Alabama, when an execution has been issued during the life-time of a defendant, but not executed, an *alias* or *pluries* may go after his death, and the personal estate of the deceased be levied on and sold to satisfy the judgment, for the reason that the lien regularly acquired under the first is continued by the succeeding writs down to the time of sale, yet it is well settled that this practice has no application to the enforcement of executions against real estate of the deceased. *Erwin v. Dundas*, § 1478.

§ 1448. An execution issued and bearing *teste* after the death of the defendant is irregular and void, and cannot be enforced against either the real or personal estate of the defendant until the judgment is revived against the heirs or devisees in the one case, or personal representatives in the other; and it makes no difference that the judgment was rendered against two defendants, one of whom is living, where the lands attempted to be sold belong to the estate of the deceased. *Ibid.*

§ 1449. The death of a defendant before the test of an execution compels the plaintiff to sue out a *scire facias*. A *feri facias* issued without this is a nullity and confers no power on the officer to whom it is issued. *Mitchell v. St. Maxent*, §§ 1479-80.

§ 1450. Where an execution is required by an attachment law which is silent as to the manner of its issue, it is to be tested and issued as writs of *feri facias* are on judgments obtained through the usual methods of the common law. *Ibid*.

§ 1451. Purchasers at judicial sales are not protected if the execution on which the sale was made is void. *Ibid*.

[NOTES.—See §§ 1481-1670.]

### WAYMAN v. SOUTHARD.

(10 Wheaton, 1-50. 1825.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This cause was certified from the circuit court for the district of Kentucky upon a certificate of a division of opinion between the judges of that court on several questions which occurred on a motion made by the plaintiffs to quash the marshal's return on an execution issued on a judgment obtained in that court, and also to quash the replevin bond taken on the said execution, for the following causes:

1. Because the marshal, in taking the replevin bond and making said return, has proceeded under the statutes of Kentucky in relation to executions; which statutes are not applicable to executions issuing on judgments in this court, but the marshal is to proceed with such executions according to the rules of the common law, as modified by acts of congress, and the rules of this court and of the supreme court of the United States.

2. That if the statutes of Kentucky in relation to executions are binding on this court, namely, the statute which requires the plaintiff to indorse on the execution that bank notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky, will be received in payment, or that the defendant may replevy the debt for two years, are in violation of the constitution of the United States and of the state of Kentucky, and void.

3. That all the statutes of Kentucky which authorize a defendant to give a replevin bond in satisfaction of a judgment or execution are unconstitutional and void.

4. Because there is no law obligatory on the said marshal which authorized or justified him in taking the said replevin bond, or in making the said return on the said execution.

The court below being divided in opinion on the points stated in the motion, at the request of the plaintiffs the same were ordered to be certified to this court.

§ 1452. Upon a certificate of a division of opinion from the circuit court the supreme court has jurisdiction only to pronounce upon the points on which the judges of the circuit court were divided.

Some preliminary objections have been made by the counsel for the defendants to the manner in which these questions are brought before the court, which are to be disposed of before the questions themselves can be considered. It is said that the proceeding was *ex parte*. The law which empowers this court to take cognizance of questions adjourned from a circuit gives jurisdiction over the single point on which the judges were divided, not over the whole cause. The inquiry, therefore, whether the parties were properly before the circuit court, cannot be made, at this time, in this place.

The defendants also insist that the judgment, the execution, and the return,

ought to be stated, in order to enable this court to decide the question which is adjourned. But the questions do not arise on the judgment or the execution, and, so far as they depend on the return, enough of that is stated to show the court that the marshal had proceeded according to the late laws of Kentucky. In a general question respecting the obligation of these laws on the officer, it is immaterial whether he has been exact, or otherwise, in his observance of them. It is the principle on which the judges were divided, and that alone is referred to this court. In arguing the first question, the plaintiffs contend that the common law, as modified by acts of congress, and the rules of this court, and of the circuit court by which the judgment was rendered, must govern the officer in all his proceedings upon executions of every description.

§ 1453. *Congress has been expressly empowered by the constitution to make laws to carry into effect the judgments of the judicial department of the United States government.*

One of the counsel for the defendants insists that congress has no power over executions issued on judgments obtained by individuals; and that the authority of the states, on this subject, remains unaffected by the constitution. That the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts, but that the state legislatures retain complete authority over them.

The court cannot accede to this novel construction. The constitution concludes its enumeration of granted powers with a clause authorizing congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.

That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce is expressly conferred by this clause seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The court, therefore, will only say, that no doubt whatever is entertained on the power of congress over the subject. The only inquiry is, how far has this power been exercised?

§ 1454. *The fourteenth section of the judiciary act of 1789 authorizes the courts of the United States to issue executions as well as other writs.*

The thirteenth section of the judiciary act of 1789, chapter 20, describes the jurisdiction of the supreme court, and grants the power to issue writs of prohibition and *mandamus*, in certain specified cases. The fourteenth section enacts: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeus corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." The seventeenth section authorizes the courts "to make all necessary rules for the orderly conducting business in the said courts;" and the eighteenth empowers a court to suspend execution, in order to give time for granting a new trial.

These sections have been relied on by the counsel for the plaintiffs.

The words of the fourteenth are understood by the court to comprehend executions. An execution is a writ, which is certainly "agreeable to the principles and usages of law."

There is no reason for supposing that the general term "writs" is restrained by the words, "which may be necessary for the exercise of their respective jurisdictions," to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. Were it even true that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done, and would consequently be necessary to the beneficial exercise of jurisdiction. If any doubt could exist on this subject, the eighteenth section, which treats of the authority of the court over its executions as actually existing, certainly implies that the power to issue them had been granted in the fourteenth section. The same implication is afforded by the twenty-fourth and twenty-fifth sections, both of which proceed on the idea that the power to issue writs of execution was in possession of the courts. So, too, the process act, which was depending at the same time with the judiciary act, prescribes the forms of executions, but does not give a power to issue them.

On the clearest principles of just construction, then, the fourteenth section of the judiciary act must be understood as giving to the courts of the Union, respectively, a power to issue executions on their judgments.

§ 1455. *Section 34 of the judiciary act applies to the formation of a judgment, not to the function of carrying it into effect.*

But this section provides singly for issuing the writ, and prescribes no rule for the conduct of the officer while obeying its mandate. It has been contended that section 34 of the act supplies this deficiency. That section enacts: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This section has never, so far as is recollected, received a construction in this court; but it has, we believe, been generally considered by gentlemen of the profession as furnishing a rule to guide the court in the formation of its judgment; not one for carrying that judgment into execution. It is "a rule of decision," and the proceedings after judgment are merely ministerial. It is, too, "a rule of decision in trials at common law;" a phrase which presents clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution or proceedings after judgment, or the effect of those proceedings. It is true that if, after the service of an execution, a question respecting the legality of the proceedings should be brought before the court by a regular suit, there would be a trial at common law; and it may be said that the case provided for by the section would then occur, and that the law of the state would furnish the rule for its decision.

But by the words of the section, the laws of the state furnish a rule of decision for those cases only "where they apply;" and the question arises, do they apply to such a case? In the solution of this question it will be necessary to inquire whether they regulate the conduct of the officer serving the execution; for it would be contrary to all principle to admit, that, in the trial of a suit depending on the legality of an official act, any other law would apply than that which had been previously prescribed for the government of the officer.

If the execution is governed by a different rule, then these laws do not apply to a case depending altogether on the regularity of the proceedings under the execution. If, for example, an officer take the property of A. to satisfy an execution against B., and a suit be brought by A., the question of property must depend entirely on the law of the state. But if an execution issue against A., as he supposes, irregularly, or if the officer should be supposed to act irregularly in the performance of his duty, and A. should, in either case, proceed against the officer, the state laws will give no rule of decision in the trial, because they do not apply to the case, unless they be adopted by this section as governing executions on judgments rendered by the courts of the United States. Before we can assume that the state law applies to such a case, we must show that it governs the officer in serving the execution; and consequently its supposed application to such a case is no admissible argument in support of the proposition that it does govern the execution. That proposition, so far as it depends on the construction of the thirty-fourth section, has already been considered; and we think that, in framing it, the legislature could not have extended its views beyond the judgment of the court.

The thirty-fourth section, then, has no application to the practice of the court, or to the conduct of its officer, in the service of an execution. The seventeenth section would seem, both from the context and from the particular words which have been cited as applicable to this question, to be confined to business actually transacted in court, and not to contemplate proceedings out of court.

The act to "regulate processes in the courts of the United States," passed in 1789 (1 Stats. at Large, 93), has also been referred to. It enacts: "That until further provision shall be made, and except where by this act, or other statutes of the United States, is otherwise provided, the forms of writs and executions, except their style and modes of process, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used in the supreme courts of the same." This act, so far as respects the writ, is plainly confined to form. But form, in this particular, it has been urged, has much of substance in it, because it consists of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate. This is certainly true, so far as respects the object to be accomplished, but not as respects the manner of accomplishing it. In a *fi. fa.*, for example, the officer is commanded to make of the goods and chattels of A. B. the sum of money specified in the writ; and this sum must, of course, be made by a sale. But the time and manner of the sale, and the particular goods and chattels which are liable to the execution, unless indeed all are liable, are not prescribed.

§ 1455a. "*Modes of process*" construed.

To "the forms of writs and executions" the law adds the words, "and modes of process." These words must have been intended to comprehend something more than "the forms of writs and executions." We have not a right to consider them as mere tautology. They have a meaning, and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, but it is also applicable to every step taken in a cause. It indicates the progressive course of the business from its commencement to its termination; and "modes of process" may be considered as equivalent to modes or manner of proceeding. If, by the word process, congress had intended nothing more than a general phrase, which might com-



prehend every other paper issuing out of a court, the language would most probably have resembled that of the first section, where the word "processes," not "process," is used in that sense. But the introduction of the word "modes," and the change of the word "processes" for "process," seem to indicate that the word was used in its more extensive sense, as denoting progressive action, a sense belonging to the noun in the singular number, rather than in the sense in which it was used in the first section, which is appropriate to the same noun in its plural number.

This construction is supported by the succeeding sentence, which is in these words: "And the forms and modes of proceedings, in causes of equity and of admiralty and maritime jurisdiction, shall be according to the course of the civil law."

The preceding sentence had adopted the forms of writs and executions, and the modes of process, then existing in the courts of the several states, as a rule for the federal courts, "in suits at common law." And this sentence adopts "the forms and modes of proceedings" of the civil law, "in causes of equity and of admiralty and maritime jurisdiction." It has not, we believe, been doubted that this sentence was intended to regulate the whole course of proceeding "in causes of equity and of admiralty and maritime jurisdiction." It would be difficult to assign a reason for the solicitude of congress to regulate all the proceedings of the court, sitting as a court of equity or of admiralty, which would not equally require that its proceedings should be regulated when sitting as a court of common law. The two subjects were equally within the province of the legislature, equally demanded their attention, and were brought together to their view. If, then, the words making provision for each fairly admit of an equally extensive interpretation, and of one which will effect the object that seems to have been in contemplation, and which was certainly desirable, they ought to receive that interpretation. "The forms of writs and executions and modes of process in suits at common law," and "the forms and modes of proceedings in causes of equity and of admiralty and maritime jurisdiction," embrace the same subject, and both relate to the progress of a suit from its commencement to its close.

§ 1456. "*In suits at common law*" construed.

It has been suggested that the words "in suits at common law" restrain the preceding words to proceedings between the original writ and judgment. But these words belong to "writs and executions," as well as to "modes of process," and no more limit the one than the other. As executions can issue only after a judgment, the words "in suits at common law" must apply to proceedings which take place after judgment.

But the legal sense of the word "suit" adheres to the case after the rendition of the judgment, and it has been so decided. Co. Litt., 291; 8 Co., 53b.

This construction is fortified by the proviso, which is in these words: "Provided that on judgments, in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance, and be at liberty to pursue the same until a tender of the debt and costs in gold or silver shall be made."

The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause. The object of this proviso is to enable the

creditor to take out a *capias ad satisfaciendum* in the first instance, and to pursue it until the debt be satisfied, notwithstanding anything to the contrary in the enacting clause. It is perfectly clear that this provision is no exception from that part of the enacting clause which relates to the "forms of writs and executions," and can be an exception to that part only which relates to the "modes of process." It secures the right to elect the *capias ad satisfaciendum* in the first instance, where that writ was at all issuable under the law of the state, and to pursue it until the debt and costs be tendered in gold or silver. It relates to the time and circumstances under which the execution may issue, and to the conduct of the officer while in possession of the execution. These, then, are the objects which congress supposed to be reached by the words "modes of process" in the enacting clause.

§ 1457. *The act of 1792 authorizes the supreme court by regulation to change the forms and modes of procedure in suits at common law in the circuit and district courts.*

This law, though temporary, has been considered with some attention, because the permanent law has reference to it and adopts some of its provisions. It was continued until 1792, when a perpetual act was passed on the subject. This, whether merely explanatory or also amendatory of the original act, is the law which must decide the question now before the court.

It enacts "that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States,' except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

This act is drawn with more deliberation than the original act; and removes, so far as respects the question now under consideration, some doubt which might be entertained in relation to the correctness with which the act of 1789 has been construed. It distinguishes very clearly between the forms of writs, and all other process of the same character, and the forms and modes of proceeding in suits, and provides for both. It is impossible to confound "the forms of writs, executions and other process," which are to be attested by a judge, and to be under the seal of the court from which they issue, with "the forms and modes of proceeding in suits." They are distinct subjects. The first describes the paper which issues from the court, and is an authority to the officer to do that which it commands; the last embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may, then, and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of "the proceedings" in the suit. This is to conform to the law of the state as it existed in September, 1789. The act adopts the state law as it then stood, not as it might afterwards be made.

A comparison of the proviso to the permanent act with that which had been introduced into the temporary act will serve to illustrate the idea that the

proceedings under the execution were contemplated in the enacting clause, and supposed to be prescribed by the words, "modes of process," in the one law, and "modes of proceeding," in the other.

The proviso to the act of 1789 authorizes the creditor to sue out a *capias ad satisfaciendum*, in the first instance, and to continue it "until a tender of the debt in gold and silver shall be made." The proviso to the act of 1792 omits this last member of the sentence.

The appraisement laws existing in some of the states authorized a debtor taken in execution to tender property in discharge of his person; and this part of the proviso shows an opinion that the enacting clause adopted this privilege and an intention to deprive him of it. The enacting clause of the act of 1792 adopts the state law to precisely the same extent with the enacting clause of the act of 1789; and the omission of the clause in the proviso which has been mentioned leaves that part of the adopted law which allows the creditor to discharge his person by the tender of property in force.

The subject was resumed in 1792, in the act entitled "An act in addition to the act entitled an act to establish the judicial courts of the United States." 1 Stats. at Large, 333.

The eighth section enacts: "That where it is now required by the laws of any state, that goods taken in execution on a writ of *feri facias* shall be appraised previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the state, to appraise goods taken in execution on a *feri facias* issued out of any court of the United States, in the same manner as if such writ had issued out of a court held under the authority of the state; and it shall be the duty of the marshal in whose custody such goods may be, to summon the appraisers in like manner as the sheriff is, by the laws of the state, required to summon them;" "and if the appraisers, being duly summoned, shall fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement."

§ 1458. *The appraisement laws recognized and adopted by the act of congress of 1792 (1 Stats. at Large, 333) are those of the states which were in force in 1792.*

This act refers to the appraisement laws of the respective states which were in force at the time of its passage, without distinguishing between those which were enacted before and those which were enacted after September, 1789. The fact, however, is understood to be, that they were enacted previous to that time generally as temporary laws, and had been continued by subsequent acts. They required, so far as they have been inspected, that appraisers should be appointed by the local tribunals to appraise the property taken in execution. Supposing laws of this description to have been adopted by the act of 1789, the regular mode of proceeding under them would have been for the courts of the United States, respectively, to appoint appraisers who should perform the same duty with respect to executions issuing out of the courts of the Union as was performed by appraisers appointed under state authority with respect to executions issuing out of the courts of the state. It was unquestionably much more convenient to employ that machinery which was already in operation, for such a purpose, than to construct a distinct system; it was more convenient to employ the appraisers already existing in the several counties of a state, than to appoint a number of new appraisers, who could not be known to the courts making such appointments. Accordingly, the section under consideration does not profess to adopt the appraisement laws of the

several states, but proceeds on the idea that they were already adopted, and authorizes the officer to avail himself of the agency of those persons who had been selected by the local tribunals to appraise property taken in execution. Had these laws been supposed to derive their authority to control the proceedings of the courts of the United States, not from being adopted by congress, but from the vigor imparted to them by the state legislatures, the intervention of congress would have been entirely unnecessary. The power which was competent to direct the appraisement was competent to appoint the appraisers.

The act passed in 1800 (2 Stats. at Large, 4), "for the relief of persons imprisoned for debt," takes up a subject on which every state in the Union had acted previous to September, 1789. It authorizes the marshal to allow the benefit of the prison rules to those who are in custody under process issued from the courts of the United States, in the same manner as it is allowed to those who are imprisoned under process issued from the courts of the respective states.

Congress took up this subject in 1792, and provided for it by a temporary law (1 Stats. at Large, 265), which was continued from time to time, until the permanent law of 1800. It is the only act to which the attention of the court has been drawn that can countenance the opinion that the legislature did not consider the process act as regulating the conduct of an officer in the service of executions. It may be supposed that in adopting the state laws as furnishing the rule for proceedings in suits at common law, that rule was as applicable to writs of *capias ad satisfaciendum* as of *feri facias*; and that the marshal would be as much bound to allow a prisoner the benefit of the rules under the act of congress as to sell upon the notice, and on the credit prescribed by the state laws.

The suggestion is certainly entitled to consideration. But were it true that the process acts would, on correct construction, adopt the state laws which give to a debtor the benefit of the rules, this single act of superfluous legislation, which might be a precaution suggested by the delicacy of the subject, by an anxiety to insure such mitigation of the hardships of imprisonment as the citizens of the respective states were accustomed to see, and to protect the officer from the hazard of liberating the person of an imprisoned debtor, could not countervail the arguments to be drawn from every other law passed in relation to proceedings on executions, and from the omission to pass laws which would certainly be requisite to direct the conduct of the officer, if a rule was not furnished by the process act.

But there is a distinction between the cases, sufficient to justify this particular provision. The jails in which the prisoners were to be confined did not belong to the government of the Union, and the privilege of using them was ceded by the several states, under a compact with the United States. The jailers were state officers, and received prisoners committed under process of the courts of the United States, in obedience to the laws of their respective states. Some doubt might reasonably be entertained, how far the process act might be understood to apply to them.

The resolution of congress (1 Stats. at Large, 96), under which the use of the state jails was obtained, "recommended it to the legislatures of the several states to pass laws, making it expressly the duty of the keepers of their jails to receive, and safe keep therein, all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws

thereof." The laws of the states, so far as they have been examined, conform to this resolution. Doubts might well be entertained of permitting the prisoner under this resolution and these laws to have the benefit of the rules. The removal of such doubts seems to have been a prudent precaution.

The case of *Palmer v. Allen*, 7 Cranch, 550, may be considered, at first sight, as supporting the opinion that the acts for regulating processes in the courts of the United States do not adopt the laws of the several states, as they stood in September, 1789, as the rule by which the officers of the federal courts are to be governed in the service of process issuing out of those courts; but, upon an examination of that case, this impression will be removed.

In that case, as appears from the statement of the judge who delivered the opinion of this court, Palmer, as deputy marshal, arrested Allen on a writ sued out of the district court of Connecticut, by the United States, to recover a penalty under a statute of the United States. Bail was demanded, and not being given, Allen was committed to prison. For this commitment Allen brought an action of trespass, assault and battery, and false imprisonment in the state court. Palmer pleaded the whole matter in justification, and upon demurrer the plea was held insufficient. The judgment of the state court was brought before this court by writ of error, and was reversed; this court being of opinion that the plea was a good bar to the action.

The demurrer was sustained in the state court, because, by an act of the legislature of Connecticut, the officer serving process similar to that which was served by Palmer must, before committing the person on whom it is served to jail, obtain a *mittimus* from a magistrate of the state, authorizing such commitment; and that court was of opinion that the act of congress had adopted this rule so as to make it obligatory on the officer of the federal court.

This court was of opinion that the plea made out a sufficient justification, and, therefore, reversed the judgment of the state court. This judgment of reversal is to be sustained for several reasons, without impugning the general principle that the acts under consideration adopt the state laws as they stood in September, 1789, as giving the mode of proceeding in executing process issuing out of the courts of the United States.

The act of 1792, for regulating processes in the courts of the United States, enacts that "the modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled an act to regulate processes in the courts of the United States."

The indorsement of a *mittimus* on the writ had never been used, as appears by the opinion in the case of *Palmer v. Allen*, in the courts of the United States for the district of Connecticut. In connection with this fact the provision of the act of 1792 subjects the modes of proceeding under the laws of the state "to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient." The uniform course of that court, from its first establishment, dispensing with this *mittimus*, may be considered as the alteration in this particular which the court was authorized by law to make.

It may well be doubted, too, whether the act of congress which conforms the modes of proceeding in the courts of the Union to those in the several states requires the agency of state officers in any case whatever not expressly mentioned. The laws of the Union may permit such agency, but it is by no means clear that they can compel it. In the case of the appraisement laws,

already noticed, it was deemed necessary to pass a particular act, authorizing the marshal to avail himself of the appraisers for the state; and the same law dispenses with the appraisal should they fail to attend. If the *mittimus* should be required by the act of congress it should be awarded by a judge of the United States, not by a state magistrate, in like manner as an order for bail, in doubtful cases, is indorsed by a judge of the United States, in cases where the state law requires such indorsement to be made by the judge or justice of the court from which the process issues. The *mittimus* is a commitment for want of bail; and the magistrate who awards it decides, in doing so, that it is a case in which bail is demandable. But in the particular case of Allen, 7 Cranch, 550, that question was decided by the law. The act of congress (act of 1799, March 2, sec. 65; 1 Stats. at Large, 676) required that bail should be given. No application to the judge was necessary. The officer was compelled to arrest the body of Allen, and to detain him in custody until bail should be given. This act, therefore, dispenses with any order of a judge requiring bail, and with a *mittimus* authorizing a commitment for the want of bail. The officer was obliged to detain the body of Allen in custody, and this duty was best performed by committing him to jail. These reasons operated with the court as additional to the opinion that the law of Connecticut, requiring a *mittimus* in civil cases, was, in its terms, a peculiar municipal regulation imposing a restraint on state officers, which was not adopted by the process act of the United States, and was a provision inapplicable to the courts of the Union, a provision which could not be carried into effect according to its letter.

The reasons assigned by the court for its decision in the case of Palmer v. Allen, 7 Cranch, 550, so far from implying an opinion that the process act does not adopt the laws of the several states, as giving a rule to be observed by the officer in executing process issuing from the courts of the United States, recognizes the general principle, and shows why that case should be taken out of its operation.

§ 1459. *In adopting the acts of the several states regulating proceedings at common law, the act of congress, known as the process act, confines itself to those in force in 1789.*

So far as the process act adopts the state laws as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September, 1789. The act of congress does not recognize the authority of any laws of this description which might be afterwards passed by the states. The system as it then stood is adopted, "subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

This provision enables the several courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest, and especially to adopt such state laws on this subject as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789. The counsel for the defendants contend that this clause, if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which congress can never be supposed to intend, and has not the power to make.

But congress has expressly enabled the courts to regulate their practice by other laws. The seventeenth section of the judiciary act of 1789, chapter 20,

enacts: "That all the said courts shall have power" "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States;" and the seventh section of the act, "in addition to the act entitled an act to establish the judicial courts of the United States" (act of 1793, chapter 22, section 7), details more at large the powers conferred by the seventeenth section of the judiciary act. These sections give the court full power over all matters of practice; and it is not reasonable to suppose that the process act was intended solely for the same object. The language is different; and the two sections last mentioned have no reference to state laws.

It will not be contended that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that the legality of which the counsel for the defendants admit. The seventeenth section of the judiciary act, and the seventh section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by congress. The courts, for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details. To determine the character of the power given to the courts by the process act, we must inquire into its extent. It is expressly extended to those forms and modes of proceeding in suits at common law, which were used in the state courts in September, 1789, and were adopted by that act. What, then, was adopted?

We have supposed that the manner of proceeding under an execution was comprehended by the words, "forms and modes of proceeding in suits" at common law. The writ commands the officer to make the money for which judgment has been rendered. This must be understood as directing a sale, and, perhaps, as directing a sale for ready money. But the writ is entirely silent with respect to the notice, with respect to the disposition which the officer is to make of the property between the seizure and sale; and, probably, with respect to several other circumstances which occur in obeying its mandate. These are provided for in the process act. The modes of proceeding used in the courts of the respective states are adopted for the courts of the Union, and they not only supply what is not fully expressed in the writ, but have, in some respects, modified the writ itself, by prescribing a more indirect and circuitous mode of obeying its mandate than the officer could be justified in adopting. In some instances the officer is permitted to leave the property with the debtor, on terms prescribed by the law, and in others, to sell on a prescribed credit, instead of ready money.

Now, suppose the power to alter these modes of proceeding, which the act conveys in general terms, was specifically given. The execution orders the officer to make the sum mentioned in the writ out of the goods and chattels of

the debtor. This is completely a legislative provision, which leaves the officer to exercise his discretion respecting the notice. That the legislature may transfer this discretion to the courts, and enable them to make rules for its regulation, will not, we presume, be questioned. So with respect to the provision for leaving the property taken by the officer in the hands of the debtor till the day of sale. He may do this, independent of any legislative act, at his own peril. The law considers the property as his, for the purposes of the execution. He may sell it, should it be produced, in like manner as if he had retained it in his personal custody, or may recover it, should it be withheld from him. The law makes it his duty to do that which he might do in the exercise of his discretion, and relieves him from the responsibility attendant on the exercise of discretion, in a case where his course is not exactly prescribed, and he deviates from that which is most direct. The power given to the court to vary the mode of proceeding in this particular is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle. It is, in all its parts, the regulation of the conduct of the officer of the court in giving effect to its judgments. A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered. It is, undoubtedly, proper for the legislature to prescribe the manner in which these ministerial offices shall be performed, and this duty will never be devolved on any other department without urgent reasons. But in the mode of obeying the mandate of a writ issuing from a court, so much of that which may be done by the judiciary under the authority of the legislature seems to be blended with that for which the legislature must expressly and directly provide, that there is some difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its courts.

The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not enter unnecessarily.

Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies already possessing distinct systems, and accustomed to laws which, though originating in the same great principles, had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that in many of the states the pressure of the moment had produced deviations from that course of administering justice between debtor and creditor which consisted not only with the spirit of the constitution, and, consequently, with the views of the government, but also with what might safely be considered as the permanent policy, as well as interest, of the states themselves. The new government could neither entirely disregard these circumstances nor consider them as permanent. In adopting the temporary mode of proceeding with executions then prevailing in the several states, it was proper to provide for that return to ancient usage, and just as well as wise principles, which might be expected from those who had yielded to a supposed necessity in departing from them. Congress prob-



ably conceived that this object would be best effected by placing in the courts of the Union the power of altering the "modes of proceeding in suits at common law," which includes the modes of proceeding in the execution of their judgments, in the confidence that in the exercise of this power the ancient, permanent and approved system would be adopted by the courts, at least as soon as it should be restored in the several states by their respective legislatures. Congress could not have intended to give permanence to temporary laws of which it disapproved; and, therefore, provided for their change in the very act which adopted them.

But the objection which gentlemen make to this delegation of legislative power seems to the court to be fatal to their argument. If congress cannot invest the courts with the power of altering the modes of proceeding of their own officers in the service of executions issued on their own judgments, how will gentlemen defend a delegation of the same power to the state legislatures? The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in congress, and cannot receive it by delegation. How, then, will gentlemen defend their construction of the thirty-fourth section of the judiciary act? From this section they derive the whole obligation which they ascribe to subsequent acts of the state legislatures over the modes of proceeding in the courts of the Union. This section is unquestionably prospective as well as retrospective. It regards future as well as existing laws. If, then, it embraces the rules of practice, the modes of proceeding in suits; if it adopts future state laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the state legislatures the power which the constitution has conferred on congress, and which gentlemen say is incapable of delegation.

As construed by the court, this section is the recognition of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made.

§ 1460. *The laws of Kentucky passed after the process act of congress, and regulating executions, are not applicable to executions issued upon judgments rendered by the federal courts.*

But the question respecting the right of the courts to alter the modes of proceeding in suits at common law, established in the process act, does not arise in this case. That is not the point on which the judges at the circuit were divided and which they have adjourned to this court. The question really adjourned is, whether the laws of Kentucky respecting executions, passed subsequent to the process act, are applicable to executions which issue on judgments rendered by the federal courts?

If they be, their applicability must be maintained, either in virtue of the thirty-fourth section of the judiciary act, or in virtue of an original inherent power in the state legislatures, independent of any act of congress, to control the modes of proceeding in suits depending in the courts of the United States, and to regulate the conduct of their officers in the service of executions issuing out of those courts.

That the power claimed for the state is not given by the thirty-fourth section of the judiciary act has been fully stated in the preceding part of this opinion. That it has not an independent existence in the state legislatures is, we think, one of those political axioms an attempt to demonstrate which would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will probably never be advanced.

Its utter inadmissibility will at once present itself to the mind if we imagine an act of a state legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficacy of such an act. It seems not much less extravagant to maintain that the practice of the federal courts and the conduct of their officers can be indirectly regulated by the state legislatures by an act professing to regulate the proceedings of the state courts and the conduct of the officers who execute the process of those courts. It is a general rule that what cannot be done directly from defect of power cannot be done indirectly.

The right of congress to delegate to the courts the power of altering the modes (established by the process act) of proceedings in suits has been already stated; but, were it otherwise, we are well satisfied that the state legislatures do not possess that power.

This opinion renders it unnecessary to consider the other questions adjourned in this case. If the laws do not apply to the federal courts, no question concerning their constitutionality can arise in those courts.

#### BANK OF THE UNITED STATES v. HALSTEAD.

(10 Wheaton, 51-66. 1825.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up on a division of opinion of the judges of the circuit court of the United States for the district of Kentucky, upon a motion there made to quash the return of the marshal upon a *venditioni exponas* issued in this cause. The writ commanded the marshal to expose to sale certain articles of property therein particularly specified, and, among other things, two hundred acres of land of Abraham Venable, one of the defendants. The marshal, in his return, states substantially that he had exposed to sale, for cash, the lands mentioned in the writ, no indorsement having been made on the execution to receive in payment certain bank-notes, according to the provision of the laws of Kentucky. That the lands had been valued at \$26 per acre, and, upon the offer of sale, no more than \$5 per acre was bid, which not being three-fourths of the appraised value, the land was not sold, thereby conforming his proceedings under the *venditioni exponas* to the directions of the law of Kentucky of the 21st of December, 1821, which prohibits the sale of property taken under execution for less than three-fourths of its appraised value without the consent of the owner.

The motion in the court below was to quash this return and to direct the marshal to proceed to sell the land levied upon without regard to the act above referred to. Upon this motion, the judges, being divided in opinion, have, according to the provisions of the act of congress in such cases, certified to this court the following questions: 1. Whether the said act of the general assembly of Kentucky, when applied to this case, was or was not repugnant to the constitution of the United States? and, 2. Whether, if it were not repugnant to the constitution, it would operate upon and bind and direct the mode in which the *venditioni exponas* should be enforced by the marshal and forbid a sale of the land levied upon, unless it commanded three-fourths of its value when estimated, according to the provisions of the said act?

In examining these questions I shall invert the order in which they have been certified to this court, because, if the law does not apply to the case so

as to regulate and govern the conduct of the marshal, it will supersede the necessity of inquiring into its constitutionality. It ought to be borne in mind that this law does not profess in terms to extend to marshals or to executions issued out of the courts of the United States, and it is only by some general expressions that either can by possibility be embraced within the law. And it ought not, in justice to the legislature, to be presumed that it was intended by any general terms there used to regulate and control that over which it is so manifest they had no authority.

§ 1461. *Judicial power necessarily implies the power to carry its judgments into effect.*

It certainly cannot be contended with the least color of plausibility that congress does not possess the power to legislate with respect both to the form and effect of executions issued upon judgments recovered in the courts of the United States. The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if after judgment it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States. The authority to carry into complete effect the judgments of the courts necessarily results, by implication, from the power to ordain and establish such courts. But it does not rest altogether upon such implication; for express authority is given to congress to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. The right of congress, therefore, to regulate the proceedings on executions, and direct the mode and manner and out of what property of the debtor satisfaction may be obtained, is not to be questioned, and the only inquiry is how far this power has been exercised. The critical review taken by the chief justice of the various laws of the United States, in the opinion delivered in the case of *Wayman v. Southard*, 10 Wheat., 20 (§§ 1452-60, *supra*), very much abridges an examination that might otherwise have been proper in this case. The result of that opinion shows that congress has adopted, as the guide for the courts of the United States, the processes which were used and allowed in the supreme courts of the several states in the year 1789. That the thirty-fourth section of the judiciary act (1 Stats. at Large, 92), which requires that the laws of the several states shall be regarded as rules of decision in trials at common law, in the courts of the United States, has no application to the practice of the courts, or in any manner calls upon them to pursue the various changes which may take place from time to time in the state courts, with respect to their processes and modes of proceeding under them. The principal inquiry in this case is, whether the laws of the United States authorize the courts so to alter the form of the process of execution, which was in use in the supreme courts of the several states in the year 1789, as to uphold the *venditioni exponas* issued in this cause. In the year 1792 (1 Stats. at Large, 275), when the process act of 1789 (1 Stats. at Large, 93) was made perpetual, land in the state of Kentucky could not be taken and sold on execution; a law, however, subjecting lands to executions was passed shortly thereafter, in the same year; and the question now arises, whether the circuit court of the United States for the Kentucky district could so alter the process of execution as to authorize the seizure and sale of land by virtue thereof.

For the decision of this question it is necessary again to recur to some of the acts of congress which were under consideration in the case referred to, for

the purpose of ascertaining whether they do not provide as well for the effect and operation as for the form of process.

§ 1462. *By 1 Stats. at Large, 91, the courts of the United States were empowered to issue a variety of writs, among others executions.*

By the fourteenth section of the judiciary act (1 Stats. at Large, 91), power is given to the courts of the United States to issue a writ of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. That executions are among the writs hereby authorized to be issued cannot admit of a doubt; they are indispensably necessary for the beneficial exercise of the jurisdiction of the courts; and in subsequent parts of the act, this writ is specifically named as one to be used, and the control which the court, in certain cases, is authorized to exercise over it is pointed out. The precise limitations and qualifications of this power, under the terms, agreeable to the principles and usages of law, is not perhaps so obvious. It doubtless embraces writs sanctioned by the principles and usages of the common law. But it would be too limited a construction, as it respects writs of execution, to restrict it to such only as were authorized by the common law. It was well known to congress that there were in use in the state courts, writs of execution other than such as were conformable to the usages of the common law. And it is reasonable to conclude that such were intended to be included under the general description of writs agreeable to the principles and usages of law. If it had been intended to restrict the power to common law writs, such limitation would probably have been imposed in terms. That it was intended to authorize writs of execution sanctioned by the principles and usages of the state laws is strongly corroborated by the circumstance that the process act, passed a few days thereafter, adopts such as the only writs of execution to be used. Can it be doubted but that under the power here given in the judiciary act, the courts of the United States, in those states where lands were liable to be taken and sold on execution, would have been authorized to issue a like process? But under this act the courts are not restricted to the kind of process used in the state courts, or bound in any respect to conform themselves thereto. This latitude of discretion was not deemed expedient to be left with the courts; and the act of the 29th of September, 1789, entitled "An act to regulate processes in the courts of the United States," modifies and limits this power.

§ 1463. *By the act of 1789, the forms of writs and executions in federal courts were required to correspond with those in use in the supreme courts of the respective states.*

So far as is material to the present inquiry, it declares that the forms of writs and executions, and modes of process, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. The form of the writ contains substantially directions as to what is to be done under it. Whether mesne or final process, it is on its face so shaped and moulded as to be adapted to the purposes for which it is intended. This act, therefore, adopts the effect as well as the form of the state processes; and as these were various in the different states, it goes further, and adopts the modes of process, which must include everything necessary to a compliance with the command of the writ. The effect and operation of executions must of course vary in the different states, according to the different forms which were used and allowed. The

mode of proceeding where lands, for instance, were liable to be taken and sold on execution, was different from that which would be necessary where they were only liable to be extended under an *elegit*. It was therefore necessary to adopt the modes of process if the process itself was adopted. This act was temporary; and continued from time to time, until the permanent law of the 8th of May, 1792, was passed; the second section of which, so far as relates to the second question, declares that the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits of common law, in the courts of the United States, shall be the same as are now used in the said courts, in pursuance of the act entitled "An act to regulate processes in the courts of the United States." This section then goes on to prescribe the rules and principles by which the courts of equity, and of admiralty and maritime jurisdiction, were to be governed; and then follows this provision: "Subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same."

There can be no doubt that the power here given to the courts extends to all the subjects in the preceding parts of the section; and embraces as well the forms of process and modes of proceeding in suits of common law as those of equity and of admiralty and maritime jurisdiction. It will be perceived that this act presupposes that, in point of practice, the several courts of the United States had carried into execution the provisions of the act of 1789; and had adopted the forms of process, and modes of proceeding thereon, which were then usual, and allowed in the supreme courts of the respective states; and it ratifies and continues such practice, and extends it to all proceedings in suits. This course was no doubt adopted as one better calculated to meet the views and wishes of the several states, than for congress to have framed an entire system for the courts of the United States, varying from that of the state courts. They had in view, however, state systems then in actual operation, well known and understood, and the propriety and expediency of adopting which, they would well judge of and determine. Hence the restriction in the act now used and allowed in the supreme courts of the several states. There is no part of the act, however, that looks like adopting prospectively, by positive legislative provision, the various changes that might thereafter be made in the state courts. Had such been the intention of congress, the phraseology of the act would doubtless have been adapted to that purpose. It was, nevertheless, foreseen that changes probably would be made in the processes and proceedings in the state courts, which might be fit and proper to be adopted in the courts of the United States; and, not choosing to sanction such changes absolutely in anticipation, power is given to the courts over the subject, with a view, no doubt, so to alter and mould their processes and proceedings as to conform to those of the state courts as nearly as might be, consistently with the ends of justice. This authority must have been given to the courts for some substantial and beneficial purpose. If the alterations are limited to mere form, without varying the effect and operation of the process, it would be useless. The power here given, in order to answer the object in view, cannot be restricted to form as contradistinguished from substance, but must be understood as vesting in the courts authority so to frame, mould and shape the process as to adapt it to the purpose intended.

§ 1464. — *although required to conform generally to the forms of state supreme courts, the federal courts had power to make changes and additions to the forms at their discretion.*

The general policy of all the laws on this subject is very apparent. It was intended to adopt, and conform to, the state process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the courts of the United States. They have authority, therefore, from time to time to alter the process, in such manner as they shall deem expedient, and likewise to make additions thereto, which necessarily implies a power to enlarge the effect and operation of the process. The exercise of this power is, to be sure, left in the discretion of the court; but the object and purpose for which it is given is so plainly marked that it is hardly to be presumed the courts would omit carrying it into execution without some substantial reason. And, the better to insure this, authority is given to this court to prescribe to the circuit and district courts such regulations on the subject as it shall think proper. And should this trust not be duly and discreetly exercised by the courts, it is at all times in the power of congress to correct the evil by more specific legislation. But so long as the courts of the United States shall make such alterations or additions in their process of execution as only to reach property made subject to execution from the state courts, there would seem to be no just ground for complaint. When, therefore, the law of Kentucky made land subject to executions, it was carrying into effect the spirit and object of the act of congress for the circuit court so to alter and add to the form of its execution as to authorize the taking and selling the debtor's land.

§ 1465. *The authority granted by the act of 1792 to the courts to alter forms and processes was not the delegation of legislative power.*

It is said, however, that this is the exercise of legislative power which could not be delegated by congress to the courts of justice. But this objection cannot be sustained. There is no doubt that congress might have legislated more specifically on the subject and declared what property should be subject to executions from the courts of the United States. But it does not follow that, because congress might have done this, they necessarily must do it, and cannot commit the power to the courts of justice. Congress might regulate the whole practice of the courts if it was deemed expedient so to do; but this power is vested in the courts, and it never has occurred to any one that it was a delegation of legislative power. The power given to the courts over their process is no more than authorizing them to regulate and direct the conduct of the marshal in the execution of the process. It relates, therefore, to the ministerial duty of the officer, and partakes no more of legislative power than that discretionary authority intrusted to every department of the government in a variety of cases. And, as is forcibly observed by the court, in the case of *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452-60, *supra*), the same objection arises to delegating this power to the state authorities, as there does to intrusting it to the courts of the United States. It is as much a delegation of legislative power in the one case as in the other. It has been already decided, in the case referred to, that the thirty-fourth section of the judiciary act has no application to the practice of the courts of the United States, so as in any manner to govern the form of the process of execution. And all the reasoning of the court which denies the application of this section to the form applies with equal force to the effect or extent and operation of the process. If, therefore,

congress has legislated at all upon the effect of executions, they have either adopted and limited it to that which would have been given to the like process from the supreme courts of the respective states, in the year 1789, or have provided for changes by authorizing the courts of the United States to make such alterations and additions in the process itself as to give it a different effect.

§ 1466. *Executions against land.*

To limit the operation of an execution now, to that which it would have had in the year 1789, would open a door to many and great inconveniences, which congress seems to have foreseen and to have guarded against, by giving ample powers to the courts so to mould their process as to meet whatever changes might take place. And if any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, the practical construction heretofore given to it ought to have great weight in determining both questions. It is understood that it has been the general if not the universal practice of the courts of the United States so to alter their executions as to authorize a levy upon whatever property is made subject to the like process from the state courts; and under such alterations many sales of land have no doubt been made, which might be disturbed if a contrary construction should be adopted. That such alteration, both in the form and effect of executions, has been made by the circuit court for the district of Kentucky, is certain from the case now before us, as in 1789 land in Kentucky could not be sold on execution. If the court then had the power to so frame and mould the execution in this case as to extend to lands, the only remaining inquiry is, whether the proceedings on the execution could be arrested and controlled by the state law? And this question would seem to be put at rest by the decision in the case of *Wayman v. Southard*, 10 Wheat., 1. The law of Kentucky, as has been already observed, does not in terms profess to exercise any such authority; and if it did it must be unavailing. An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws any further than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not in such case act under the authority of the state law, but under that of the United States, which adopts such law. An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment, and all proceedings on the execution are proceedings in the suit, and which are expressly, by the act of congress, put under the regulation and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty and a due execution of the process according to its command. But we are not left to rest upon any implied power of the court for such authority over the officer. By the seventh section of the act of the 2d of March, 1793 (1 Stats. at Large, 335), it is declared that "it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, etc., and to regulate the practice of the said courts respectively, in such manner as shall be fit and necessary for the advancement of justice, and especially to the end to prevent delays in proceedings." To permit the marshal in this case to be governed and controlled by the state law is not only delaying but may be entirely defeating the effect and

operation of the execution, and would be inconsistent with the advancement of justice.

Upon the whole, therefore, the opinion of the court is that the circuit court had authority to alter the form of the process of execution so as to extend to real as well as personal property, when, by the laws of Kentucky, lands were made subject to the like process from the state courts; and that the act of the general assembly of Kentucky does not operate upon and bind and direct the mode in which the *venditioni exponas* should be enforced by the marshal, so as to forbid a sale of the land levied upon unless it commanded three-fourths of its value according to the provisions of the said act; and that, of course, the return of the marshal is insufficient and ought to be quashed. This renders it unnecessary to inquire into the constitutionality of the law of Kentucky.

ROSS v. DUVAL.

(13 Peters, 45-64. 1839.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This suit is brought before the court by writ of error from the circuit court for the eastern district of Virginia. On the 7th of December, 1821, James S. Duval, Louis Duval and John Reinhart obtained a judgment in the circuit court against William Ross. A writ of *feri facias* issued on the judgment the 10th of January, 1822, which was delivered to the attorney for the plaintiffs and never returned. No other execution was issued until the 11th of August, 1836. A *capias ad satisfaciendum* was then sued out and executed on the body of Ross, who gave up property in discharge of his body, and entered into bond, with Henry King as surety, for the delivery of the property on the day and at the place of sale.

This bond being forfeited, a motion was made upon it, under the practice established in Virginia, for an award of execution. The motion was opposed, and the lapse of time between the rendition of the judgment and the execution of August, 1836, was relied on to show that the execution had been illegally issued, and, consequently, that the forthcoming bond was unauthorized and void. But the court entered up a judgment on the bond. To revise this judgment this writ of error is prosecuted.

In the investigation of the questions which arise in this case, it becomes necessary to refer to certain acts of congress, and also to certain statutes of Virginia. By "An act to regulate processes in the courts of the United States," passed in 1789 (1 Stats. at Large, 93), it is provided that, until further provision shall be made, and except where, by this act or other statutes of the United States, is otherwise provided, the forms of writs and executions, except their styles and modes of process in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

And by the act of May, 1792 (1 Stats. at Large, 275), it is declared "that the forms of writs, executions, and other processes, except their styles, and the forms and modes of proceeding in suits, in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act above recited." These acts adopt the execution laws of the states as they stood in 1789. An act was passed in 1793 (1 Stats. at Large, 333), and also one in 1800 (2 id., 82), on the same subject; but as none of their provisions bear upon the present case, it is unnecessary to examine them.



In 1792 the state of Virginia passed a statute providing that "judgments in any court of record within the commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after; or where execution hath issued, and no return is made thereon, the party in whose favor the same was issued shall and may obtain other executions, or move against any sheriff or other officer, etc., for the term of ten years from the date of such judgment, and not after." There is a saving in this statute in behalf of infants, etc., and persons beyond the commonwealth, giving five years, after the removal of the disability, to proceed on the judgment.

In the argument of this case in the circuit court, as appears from the bill of exceptions, it was stated by the judges, and admitted by the counsel on both sides, that so far back as the recollection of the said judges and counsel extends, it has been the usage in the county and corporation courts, and in the superior courts of law, and in the general court of Virginia, where execution has issued upon a judgment, and no return made thereon, to allow other executions to be issued. But this recollection of the practice of the judges and counsels did not extend further back than the above-recited statute of 1792.

The circuit court, however, held that under the statutes and practice of Virginia, prior to the act of 1792, where an execution had been issued within the year on a judgment, though not returned, the plaintiff was entitled to issue other executions without restriction as to time. And this is the ground taken by the counsel for the defendant in error.

A reference is made to the early statutes of Virginia which regulated executions, and also to the rule of the common law. And it is contended that the Virginia act of 1792, having passed subsequent to the taking effect of the process acts above cited, cannot affect the proceedings on the judgment of 1821. That the acts of 1789 and of 1792, which adopted the execution laws of the respective states as they stood in 1789, regulate the proceedings on the above judgment, unaffected by any subsequent legislation, either state or federal. And the decision of this court in the case of *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452-60, *supra*), is referred to as fully sustaining this position. The great question in that case was, whether "the laws of Kentucky respecting executions, passed subsequent to the process act, were applicable to executions which issued on judgments rendered by the federal courts."

§ 1467. *The process acts of 1789 and 1792 have no application to the practice of the court or the conduct of its officer in the service of execution.*

In the very elaborate opinion which was delivered by the late chief justice, a construction was given to the process acts, and to the various sections of the act to establish judicial courts, of 1789. And in order fully to comprehend the effect of this decision, the points adjudicated will be stated. The court decided that the thirty-fourth section of the judicial act, which provides "that the laws of the several states shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply," "has no application to the practice of the court, or to the conduct of its officer, in the service of an execution."

§ 1468. — *these acts adopted the state laws regulating modes of proceeding and writs at common law as they stood in 1789.*

They held that "so far as the process acts adopt the state laws, as regulating the modes of proceeding in suits at common law, including executions," etc.,

the adoption is confined to those laws in force in September, 1789. That the system, as it then stood, was adopted; subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient; or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same. The court also held "that the fourteenth section of the judiciary act gave to the courts of the United States, respectively, a power to issue executions on their judgments." Other sections in the same act are referred to and construed, but they have no direct relation to the case under consideration.

§ 1469. *Process acts passed by states after the passage of the federal process acts of 1789 and 1792 do not apply to the federal courts.*

The result of this opinion was, that the execution laws of Kentucky, having passed subsequent to the process acts, did not apply to executions issued by the circuit court of the United States, and that under the judiciary and process acts the courts had power to adopt rules to regulate proceedings on executions. The power of the court to adopt such rules was not embraced in the point certified for the decision of the court, and was not expressly adjudged; but it is the clear result of the argument of the court.

Having stated the points decided in this opinion, it is only necessary to apply such of them as are applicable to the case under consideration. There is no evidence in the record that the circuit court of Virginia ever adopted any rule which, by a fair construction, could regulate executions. In this view, then, the case must stand upon the execution law of Virginia in 1789, adopted by the process acts. And under the decision in the above case of *Wayman v. Southard*, it is clear that no subsequent changes in the process law of the state of Virginia can be obligatory on the circuit court.

§ 1470. *The act of Virginia of 1792, restricting the issuance of executions to ten years after judgment, was an act of limitation, and as such formed a rule of decision and was binding on the federal courts.*

And here the question arises, whether the Virginia act of 1792, having been passed subsequent to 1789, can have any effect in the present case. So far as this act can be held to regulate executions, it is clearly inapplicable, under the process acts of 1789 and 1792, to the circuit court. But the act is substantially and technically a limitation on judgments. It is not, therefore, an act to regulate process. Executions are named in the act, and are authorized to be issued, under certain circumstances, within a limited time; but this is only another mode of limiting the judgment, and is strictly and technically as much a limitation on the judgment as is imposed in the first part of the same section in reference to a *scire facias* or action of debt. The act provides that, after the lapse of ten years from the rendition of a judgment, where no execution has been issued, neither an action of debt nor a *scire facias* shall be brought on it. And that where an execution has been issued and not returned, other executions and proceedings may be had within the ten years, but not afterwards.

If this, then, be a limitation law, it is a rule of property; and under the thirty-fourth section of the judiciary act is a rule of decision for the courts of the United States. As an act of limitation, it is impossible to distinguish this from other acts which limit the time of bringing certain actions, either by a designation of the ground or the form of the action. These acts are of daily

cognizance in the courts of the United States, and no one has ever doubted that, in fixing the rights of parties, they must be regarded as well in the federal as in the state courts.

The original judgment in the case under consideration was entered in 1821; and although an execution was issued within the year, which was never returned, yet no other proceedings were had on the judgment until the execution of 1836. Here was a lapse of fifteen years; and if the statute apply, the plaintiffs were barred, unless they can bring themselves within the exception. And why does not this statute apply to the federal courts? It limits actions and executions on judgments rendered in the state courts, and the same rule must be applicable to judgments obtained in the courts of the United States. In this view of the case it is not necessary to look into the Virginia execution law of 1789 to ascertain whether, if an execution was issued on a judgment within the year and not returned, the plaintiff might issue other executions without limitation. It is enough to know that the act of 1792 imposes a limitation to actions and executions on judgments, which, like all other limitation laws of the states, must be enforced by the federal courts.

§ 1471. — *under this act, after ten years, a judgment is inoperative. Its vitality is gone beyond legal renovation.*

After the lapse of ten years, under this statute, a judgment becomes inoperative. An action of debt will not lie upon it, nor can it be revived by a *scire facias*. Much less can an execution be issued on it. Its vitality is gone beyond the reach of legal renovation. In giving effect to this statute, no principle is impugned which is laid down in the case of *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452–60, *supra*). The state law which the court in that case held not to apply in the federal courts was a law that regulated proceedings on executions. It was a process act, and not an act of limitations.

Do the plaintiffs in this case bring themselves within the saving of the statute? The rule is well settled that, to avoid the statute, a party must show himself to be within its exception. No proof is offered to show that the plaintiffs in the circuit court were without the commonwealth of Virginia. The statement in the declaration is relied on to establish this fact. This statement does not aver that the plaintiffs were citizens of Pennsylvania, but represents them as “merchants and partners, trading under the firm and by the name and style of Duval & Co., of Philadelphia, in Pennsylvania.” This was insufficient to give jurisdiction to the court in the original action, if the exception had been taken by plea, or by writ of error within the limitation of such writ.

In 1821 the plaintiffs represent themselves to be of Philadelphia, in Pennsylvania; but does it follow that since that period they have not been within the commonwealth of Virginia? Does the legal inference arise that they were not within the state when the judgment was entered? We think not. Indeed, there is no allegation of citizenship by the plaintiffs in the declaration. For aught that appears on the face of the record, the plaintiffs might have been citizens of Virginia, and residents at the time of the rendition of the judgment.

The act of limitations of 1826 has been referred to in the argument, and it is proper to give a construction to it. The first section of that act bars all actions founded upon bonds executed by executors, administrators, guardians, etc., and other persons in a fiduciary character, which shall not be commenced

within ten years after the cause of action shall have accrued. The third section repeals the saving of the act of 1792, and the fourth section provides that "in computing the time within which rights of entry and of action then existing shall be barred by the provisions of the act of 1826, the computation shall commence from the date of the passage of that act, and not before."

Now, the question arises, what actions are barred by this act? The answer is, all actions founded on bonds, given in a fiduciary character, as described in the first section. The statute does not embrace any action founded on a judgment, or on any other ground, except on a bond of the character above stated. The saving clause of the act of 1792, as to non-residents, is repealed, the only effect of which is to bring within the limitation of the statute of 1792 those who were within its saving clause, and against whom the statute had not begun to run. Against such persons the statute could not begin to operate until the repeal of the exception by the act of 1826.

If the plaintiffs in the circuit court had brought an action of debt, or issued a *scire facias* on the original judgment, or issued an execution (an execution having been issued within the year of the rendition of the judgment, but not returned), within ten years from the passage of the act of 1826, they would not have been barred, if they could have shown that up to the passage of that act they were within the saving of the act of 1792. But failing to do this, as they have failed in the present case, the action on the judgment and the execution would have been barred at the expiration of ten years from its rendition, under the act of 1762. In the repeal of the saving clause of this act, by the act of 1826, executions are not named as within the saving, but only "the right or title to any action or entry accrued;" and a doubt has been suggested whether a person within the saving clause of the act of 1792 might not claim the right still to issue executions on a judgment on which no action of debt or *scire facias* could be sustained. We think that it was the intention of the legislature to repeal the saving clause of the act of 1792 as to non residents, in all its parts, although the language of the repealing clause does not include the term execution. It cannot be supposed that the legislature would bar an action on a judgment, and still authorize an execution to be issued on it.

There is another view of this case, which, though not much considered in the argument, is deemed important by the court.

And this arises under the process act of 1828. The third section of this act provides "that writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state respectively as are now used in the courts of such state:" "Provided, however, that it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter the final process in said courts as to conform the same to any change which may be adopted by the legislature of the respective states for the state courts."

This act adopts, in specific terms, the execution laws of the state, and if the limitation law of 1792 could be considered, so far as its provisions embrace executions, a process act, this act of 1828 adopts it, and the plaintiffs in the original judgment were bound to conform to its provisions. To this it is objected that the courts of Virginia have uniformly construed the act of 1792 as not affecting judgments entered before its passage; and that as the law of 1828 adopts this statute by the same rule of construction, it cannot operate on

judgments rendered prior to that time. The answer to this argument is, in the first place, if the act of 1792, or any part of it, is to be considered as a process act merely and not an act of limitations, the act of 1828 makes it the law of congress for the state of Virginia, and gives immediate effect to it. If it be viewed as an act of limitations merely, and not for the regulation of process, it then takes effect, as before remarked, as a rule of property, and is a rule of decision in the courts of the United States under the thirty-fourth section of the judiciary act. In either case effect is given to the act of 1792, and it is decisive of the present controversy.

But if it be considered, as contended, an act of limitations adopted by the act of 1828, the answer is that the court are to give a construction to the act of 1828. If this act be clear in its provisions we are bound to give effect to it, although it may, to some extent, vary the construction of the act of 1792. And this is no violation of the rule that this court will regard the settled construction of a state statute as a rule of decision. For in this case the construction of the state law, in regard to the effect it shall have, is controlled by the paramount law of congress. The words are, "that writs of execution and other final process issued on judgments and decrees rendered;" not on judgments and decrees hereafter rendered. The law provides for executions, not judgments. And it operates on all executions issued subsequent to its passage, without reference to the time when the judgment was rendered.

The judgment in the circuit court was entered in 1821, so that seven years of the ten years' limitation of the act of 1792 had run when it was adopted by the act of 1828. Now, the question is, shall no effect be given to this act of congress in Virginia on judgments before its passage, because of the construction by the Virginia courts of the act of 1792? It must be recollected that this act of 1828 is a national law and was intended to operate in the national courts in every state. As it regards some of the states, it may, at first, have operated less beneficially in them than in others. But its provisions took immediate effect in all the states.

It is a sound principle that where a statute of limitations prescribes the time within which suit shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act, and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases. There may be some seemingly contradictory decisions on this point in some of the states, which have been influenced by local considerations and the peculiar language or policy of certain acts of limitations. But the rule is believed to be founded on principle and authority.

The act of 1828 was passed shortly after the decision of the cases of *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452-60, *supra*), and *The United States Bank v. Halstead*, 10 Wheat., 51 (§§ 1461-66, *supra*), and was intended as a legislative sanction to the opinions of the court in those cases. This act is more explicit than the previous acts on the same subject as to the power of the courts of the United States to adopt rules to regulate final process. And it is well remarked by Mr. Justice Story in giving the opinion of the court in the case of *Beers v. Haughton*, 9 Pet., 363, that, under this law, "the circuit court had authority to make such a rule as a regulation of the proceedings upon final process so as to conform the same to those of the state laws on the same subject." And this power to adopt rules, so as to conform to the state laws, extends to the future legislation of the states, and as well to the modes of proceeding on executions as to the forms of the writs.

§ 1472. *A forthcoming bond given under an execution issued on a dead judgment is void.*

From the above considerations the court are of opinion, whether the proceedings in the circuit court in issuing the execution and giving a judgment on the forthcoming bond be considered as regulated by the process acts of 1789 and 1792, or by the process act of 1828, there is error in the judgment, and that it must be reversed.

BOYLE v. ZACHARIE.

(6 Peters, 648-660. 1832.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the district of Maryland, between the same parties, and upon the same judgment on which the bill in equity, which has just been disposed of, was founded. The facts relative to the judgments need not be again repeated, as they are fully disclosed in the preceding cause. (a)

The object of the present writ of error is to revise the decision of the circuit court in refusing to quash a writ of *venditioni exponas*, issued for the sale of the ship General Smith, which was seized upon the *feri facias* on the judgment, upon a motion made by the counsel for Boyle for that purpose. The *feri facias* was levied on the ship on the 31st of March, 1828; the bill in equity was filed, and an injunction awarded, on the 8th of the succeeding April. On the 8th of May following, the writ of *feri facias* was returned to the circuit court with the marshal's return thereon, "levied as per schedule on the 31st of March, 1828. Injunction issued on the 8th of April, 1828." On the 29th of August, 1829, a writ of *venditioni exponas* issued from the circuit court, returnable to the next December term of the court. At the return term, a motion was made in behalf of Boyle to quash the *venditioni exponas*, grounded, among other things, upon the injunction, and bond given in pursuance thereof, and the provisions of the act of Maryland of 1799, chapter 79, and the act of Maryland of 1723, chapter 8. A rule was then made, at the same term, upon the marshal, to return the writ of *venditioni exponas*, upon which he made a return, in substance, that the amount of the money had been paid into his hands, and was now in bank to his credit, to be returned as made under the writ of *venditioni exponas*, if the court should be of opinion that it rightfully issued, and empowered and obliged the marshal to sell the ship seized under the *feri facias* issued in 1828, stayed by injunction as aforesaid. The court overruled the motion to quash the *venditioni exponas*, and ordered the money returned on the writ to be brought into court. The present writ of error is brought upon this refusal to quash the *venditioni exponas*.

The first question naturally presenting itself upon this posture of the facts is, whether a writ of error lies in such a case. It is material to state that no error is assigned on the original judgment, or on the award of the *feri facias*, which, indeed are conceded to have been rightfully issued, and to be above exception. But the error assigned is the supposed irregularity and incorrectness of the award of the *venditioni exponas*, after the writ of injunction from the chancery side of the court had been granted.

(a) Boyle v. Zacharie, 6 Pet., 685.

§ 1473. *Courts of law may but are not bound to quash executions erroneously awarded. It is in the sound discretion of the court, and a writ of error does not lie for a refusal to quash.*

The argument to maintain the writ of error has proceeded, in a great measure, upon grounds which are not in the slightest degree controverted by this court. It is admitted that the language in Co. Litt., 288b, is entirely correct in stating that "a writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment or execution" in a suit. But it is added, in the same authority, that "without a judgment or an award in the nature of a judgment, no writ of error doth lie." If, therefore, there is an erroneous award of execution not warranted by the judgment, or erroneous proceedings under the execution, a writ of error will lie to redress the grievance. The question here is not whether a writ of error lies to an erroneous award of execution, for there was no error in the award of the *feri facias*. But the question is, whether a writ of error lies on the refusal to quash the auxiliary process of *venditioni exponas*, upon mere motion. In modern times, courts of law will often interfere by summary proceedings on motion, and quash an execution erroneously awarded, where a writ of error or other remedy, such as a writ of *audita querela*, would clearly lie. But, because a court may, it does not follow that it is bound thus to act in a summary manner; for in such cases the motion is not granted *ex debito justitiæ*, but in the exercise of a sound discretion by the court. The relief is allowed or refused, according to circumstances; and it is by no means uncommon for the court to refuse to interfere upon motion, in cases where the proceedings are clearly erroneous, and to put the party to his writ of error or other remedy; for the refusal of the motion leaves every remedy which is of right open to him.

In *Brooks v. Hunt*, 17 Johns., 484, Mr. Chancellor Kent, in delivering the opinion of the court of errors, alluding to this practice, said: "It is not an uncommon thing for a court of law, if the case be difficult or dubious, to refuse to relieve a party after judgment and execution in a summary way by motion, and to put him to his *audita querela*." That was a case very similar to the present. A motion was made to the supreme court of New York to set aside a *feri facias*, on the ground that the party was discharged under the insolvent laws of that state. The court refused the motion; and, on error brought, the court of errors of New York quashed the writ of error. Mr. Chancellor Kent, on behalf of the court, assigned as one of the grounds of quashing the writ of error, that the rule or order denying the motion was not a judgment within the meaning of the constitution or laws of New York. It was only a decision upon a collateral or interlocutory point, and could not well be distinguished from a variety of other special motions and orders which are made in the progress of a suit, and which have never been deemed the foundation of a writ of error. A writ of error would only lie upon a final judgment or determination of a cause; and it was never known to lie upon a motion to set aside process. And in the close of his opinion, he emphatically observed, if the case "is to be carried from this court to the supreme court of the United States, I should hope, for the credit of our practice, it might be on the *audita querela*, and not upon such a strange mode of proceeding as that of a writ of error brought upon a motion and affidavit." There are other cases leading to the same conclusion. See *Wardell v. Eden*, 1 Johns., 531, note; *Wicket v. Creamer*, 1 Salk., 264; *Johnson v. Harvey*, 4 Mass., 483; *Bleasdale v. Darby*, 9 Price, 606; *Clason v. Shotwell*, 1 Tidd's

Prac., 470, 471; Kent's (Chancellor) Opinion, 12 Johns., 31, 50; Com. Dig., Pleader, 3 B., 12. A very strong case illustrating the general doctrine is, that error will not lie to the refusal of a court to grant a peremptory *mandamus*, upon a return made to a prior *mandamus*, which the court allowed as sufficient. This was held by the house of lords, in *Pender v. Herle*, 3 Bro. Parl. Cases, 505.

We consider all motions of this sort to quash executions as addressed to the sound discretion of the court; and as a summary relief which the court is not compellable to allow. The party is deprived of no right by the refusal; and he is at full liberty to redress his grievance by writ of error, or *audita querela*, or other remedy known to the common law. The refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at the common law, error only lies from a final judgment; and, by the express provisions of the judiciary act of 1789, chapter 20, section 22 (1 Stats. at Large, 84), a writ of error lies to this court only in cases of final judgments.

§ 1474. *The chancery jurisdiction and rules of decision of the federal courts are the same in all the states, and the remedies are those of equity courts of the parent country, and not controlled by the state practice, but subject to laws of congress and rules of the federal courts.*

But if this objection were not, as we think it is, insuperable, there would be other decisive objections against the party. In the first place, the very ground of argument to maintain the motion to quash is that the injunction operated as a *supersedeas* of the execution, according to the acts of Maryland of 1723, chapter 8, and of 1799, chapter 79, regulating proceeding in chancery and injunctions, which give to an injunction the effect of a *supersedeas* at law. But the acts of Maryland regulating the proceedings on injunctions, and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States.

The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress of 1792, chapter 36 (1 Stats. at Large, 275), has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe. *Robinson v. Campbell*, 3 Wheat., 212; *United States v. Howland*, 4 Wheat., 108. So that, in this view of the matter, the effect of the injunction granted by the circuit court was to be decided by the general principles of courts of equity, and not by any peculiar statute enactments of the state of Maryland.

§ 1475. *An injunction in equity is no supersedeas.*

Strictly speaking, at the common law an injunction in equity does not operate as a *supersedeas*, although it may furnish a proper ground for the court of law in which the judgment is rendered to interfere by summary order to quash or stay the proceedings on the execution. If the injunction is dis-



obeyed, a court of equity has its own mode of administering suitable redress. But a court of law is under no obligations to enforce it as a matter of right or duty.

§ 1476. *Though the federal laws adopt the forms of writs, etc., used under the state law for the federal courts, those courts are not controlled by collateral restrictions imposed by the state upon its courts.*

In respect to suits at common law it is true that the laws of the United States have adopted the forms of writs, executions, and other process, and the modes of proceeding authorized and used under the state laws, subject, however, to such alterations and additions as may from time to time be made by the courts of the United States. But writs and executions, issuing from the courts of the United States in virtue of these provisions, are not controlled or controllable in their general operation and effect by any collateral regulations and restrictions which the state laws have imposed upon the state courts to govern them in the actual use, suspension or superseding of them. Such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States unless adopted by them. The case of *Palmer v. Allen*, 7 Cranch, 550, 564, furnishes a commentary on this point; and it is freely expounded and illustrated in the subsequent cases of *Wayman v. Southard*, 10 Wheat., 1 (§§ 1452-60, *supra*), and *United States Bank v. Halstead*, 10 Wheat., 51 (§§ 1461-66, *supra*). No rule of the circuit court of Maryland has been produced which adopts these state regulations; and the existence of one is not to be assumed.

§ 1477. *A supersedeas, in order to stay proceedings on execution, must come before levy.*

But if the injunction could be admitted to operate as a *supersedeas* at law, under any circumstances, in the courts of the United States, there would yet remain a decisive objection against its application in the present case. Nothing is better settled at the common law than the doctrine that a *supersedeas*, in order to stay proceedings on an execution, must come before there is a levy made under the execution; for if it comes afterwards, the sheriff is at liberty to proceed upon a writ of *venditioni exponas* to sell the goods. There are many cases in the books to this effect; but they are admirably summed up by Lord Chief Justice Willes, in delivering the opinion of the court in *Meriton v. Stevens*, Willes, 271, 280; to which alone, therefore, it seems necessary to refer. See *Charter v. Pector*, Cro. Eliz., 597; *Moore*, 542; *Clerk v. Withers*, 6 Mod., 290, 293, 298; S. C., 1 Salk., 321; *Blanchard v. Myers*, 9 Johns., 66; 2 Tidd's Pr., 1072; Com. Dig., Execution, C. 5, C. 8; Bac. Abridg., *Supersedeas*, G. See, also, *M'Cullough v. Guetner*, 1 Binn., 214.

In the present case the levy on the *feri facias* was made more than a week before the injunction was granted; so that, according to the course of the common law, it ought not to operate as a *supersedeas* to the *venditioni exponas*.

In every view of this case it is clear that there is no error in the proceedings which is revisable by this court. Whatever might have been properly done by the circuit court, upon the motion to quash, in order to give full effect to its own injunction, was matter exclusively for the consideration of that court in the exercise of its discretion, and is not re-examinable here. And there is no pretense of any error in the judgment or award of the execution under which the levy was made. The judgment of the circuit court is therefore affirmed, with damages at the rate of six per cent. and costs.

ERWIN v. DUNDAS.

(4 Howard, 58-80. 1845.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

STATEMENT OF FACTS.—Ejectment by Erwin to recover a lot in the city of Mobile. Erwin bought under an execution issued on a judgment against Hitchcock. The judgment against Hitchcock was a lien on his real estate. He took a writ of error from the judgment, giving bond with surety, and the judgment was affirmed by the state supreme court. Execution issued on this judgment, and after a levy all further proceedings were stopped by injunction. Hitchcock died, and an *alias* execution issued against him and his surety, James, and the property in question was sold to Erwin.

Opinion by MR. JUSTICE NELSON.

The first execution issued upon the judgment in this case was issued on the 18th of August, 1838, during the life-time of both the defendants, and was, therefore, regular and valid; but, according to the return of the sheriff, a levy was made only upon the property of James, the surety, and was abandoned when the proceedings at law were enjoined by the bill in chancery.

§ 1478. *An execution against two defendants, issued and bearing test after the death of one of them, is void as to realty, and a sale of the deceased's real estate thereunder is a nullity.*

We may, therefore, lay this execution out of the case. For although, according to the law of Alabama, when an execution has been issued during the life-time of a defendant, but not executed, an *alias* or *pluries* may go after his death, and the personal estate of the deceased be levied on and sold to satisfy the judgment, for the reason that the lien, thus regularly acquired under the first, is continued by the succeeding writs, down to the time of the sale, yet it appears to be well settled there that the practice has no application to the enforcement of executions against the real estate of the deceased. *Lucas v. Doe ex dem.* Price, 4 Ala., 679, N. S.; *Masonry v. The U. S. Bank*, id., 735; *Abercombie v. Hall*, 6 id., 657.

The validity of the plaintiff's title, therefore, must depend altogether upon the execution issued on the 10th of July, 1840, nearly one year after the death of Hitchcock, under and by virtue of which the premises in question were sold and conveyed to him. At common law the writ of *fiery facias* had relation to its *teste*, though in fact issued subsequently, and bound the goods of the defendant from that date. The act of 29 Car. II. (re-enacted in most of the states) took away this relation as it respected the rights of *bona fide* purchasers, and confined its binding effect upon the goods as to them to the time of the delivery of the writ to the sheriff; but as between the parties it remained as it stood at common law.

One consequence of this relation has been that if the execution can be regularly tested in the life-time of a deceased defendant, it may be taken out and executed against his goods and chattels after his death, the same as if that event had not intervened. The theory or fiction upon which this result is arrived at is, that the execution is taken in judgment of law to have been issued at the time it bears date, however the fact may have been, and that being prior to the death of the defendant, and the goods being bound from the *teste* or presumed issuing, execution upon them is deemed to have commenced in the life-time of the party, and being an entire thing may be completed notwithstanding his death.

It is regarded in the same light as if delivered into the hands of the sheriff and the goods bound in the life-time of the defendant, for the reason the officer being entitled to seize them at any time after the *teste*, the death of the party could not alter the right, and therefore, though the execution came to the sheriff after, still, if tested before his death, the goods may be seized, in whose hands soever they may be found.

In illustration of the extent to which this doctrine of relation is carried, we may add, it has been frequently held that if a judgment is entered in vacation against a defendant who died the preceding term, an execution tested on a day in the said term prior to the defendant's death may be sued out without a *scire facias*, for, as the judgment signed in vacation relates to and is considered as a judgment of the first day of the preceding term, and as the execution relates to the judgment, it may, in point of form, be considered as having commenced before the death of the defendant, on account of the date, or *teste*, and, of course, upon the ground above stated, being an entire thing, be completed afterwards.

There are numerous authorities establishing this view of the case in respect to the enforcement of judgments and executions against the goods or other personal estate of the defendant. Gilb. on Ex., 14, 15; Bing. on Ex., 135, 136, 190; 2 Tidd's Pr., 1000, 9th Lond. ed.; 7 T. R., 24; 6 id., 368.

This doctrine of relation is resorted to with a view of meeting and avoiding the objection, which might otherwise be alleged, that the rights of new parties, to wit, the personal representatives of the deceased, would be affected by the issuing and enforcement of the writ upon the goods after the death of the defendant, who should be called in and made parties to the record for the purpose of enabling them to interpose a defense, if any, to the judgment. For, upon the construction given, the writ is regarded as having been issued in the life-time of the defendant himself, and, inasmuch as he had not taken any steps to arrest it before his death, no good reason could be given for the interposition of his representatives. They, upon the view taken, were not new parties, nor parties at all to the proceedings, as the last step in the appropriation of the goods to the satisfaction of the judgment had been taken in the life-time of their intestate.

The same doctrine, it seems, has been held to be equally applicable to executions against the lands and tenements of a deceased defendant, and therefore an *elegit* bearing *teste* before may be issued after his death, for the reasons given in the case of executions against the goods and chattels. 2 Tidd's Pr., 1034, 9th Lond. ed. It is otherwise as respects the writ of extent issued against the king's debtor; for, as that cannot be antedated, but must bear *teste* on the day it issues, it can only be issued against the lands and goods in the life-time of the defendant. Another writ issues in case of his death to the sheriff to inquire into the special circumstances before execution is enforced. 2 Tidd's Pr., 1049, 1053, 1057.

This series of cases, coming down from the earliest history of the law on the subject, and the reasons assigned in support of them, necessarily lead to the results—and which has also been confirmed by express decision in all courts where the authority of the common law prevails—that an execution issued and bearing *teste* after the death of the defendant is irregular and void, and cannot be enforced either against the real or personal property of the defendant until the judgment is revived against the heirs or devisees in the one case or personal representatives in the other. Fitz. N. B., 266; Harwood v.

Phillips, O. Bridg., 473; Dyer, 766; Pl., 31; 2 Wms. Saund., 6, n. 1; 2 Ld. Raym., 849; Archb. Pr., 282; 2 id., 88; Woodcock v. Bennett, 1 Cow., 711; 10 Wend., 212; Hildreth v. Thompson, 16 Mass., 191.

Mr. Williams, in his note to the case of *Jefferson v. Morton*, 2 Wms. Saund., 6, n. 1, says that if the defendant dies within the year the plaintiff cannot have an *elegit* under the statute of Westm. 2, against his lands in the hands of his heirs or terre-tenants, or generally any other execution, without a *scire facias* against his heirs and terre-tenants, or personal representatives, although he may in some cases have a *feri facias* against his goods in the hands of the executors, referring to the exception to the general rule, when issued in the life-time of the defendant. So if the conusee dies within the year his executor cannot have an *elegit* at common law without a *scire facias*, nor, if the conusor dies within that time, can the conusee have an *elegit* against his heir or terre-tenant without such writ. The rule being, he says, that where a new person who was not a party to the judgment or recognizance derives a benefit, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognizance. *Penoyer v. Brace*, 1 Ld. Raym., 245; S. C., 1 Salk., 319, 320; S. C., Carth., 404.

Such is, we apprehend, the settled law of the case where the judgment is against one defendant, and the execution issued and tested after his death. In the case before us, the judgment upon which the execution was issued, and the lands sold, had been rendered against two defendants, one of whom was living at the time, but the lands sold belonged to the estate of the deceased. And it is material to inquire whether, in this aspect of the case, a different rule can be applied to the sale.

At common law, a judgment or recognizance in the nature of a judgment did not bind the lands of the defendant, nor did the execution disturb the possession, as it went only against the goods and chattels. The statute of Westm. 2, ch. 18 (13 Ed. I.), first subjected the lands of the debtor to execution on a judgment recovered against him, and gave the plaintiff the writ of *elegit*, by virtue of which the sheriff seized and delivered a moiety of the lands until the debt was levied out of the rents and profits. Under this statute a moiety of the land is deemed bound from the rendition of the judgment. 2 Bac. Abr., tit. Execution, 685; 3 Bl. Com., 418; 3 Co., 12; *The People v. Haskins*, 7 Wend., 466.

Before the statute a judgment was considered a charge only upon the personal estate of the defendant; since, a charge upon both the real and personal estate. Before and since the statute, in case of a judgment against two defendants, and the death of one, the charge of the judgment survived against the personal estate of the survivor; and execution could be taken out against him within the year without a *scire facias*, and the debt levied. 2 Tidd, 1120; 1 Salk., 320; Bing. on Ex., 136; *Norton v. Lady Harvey*, 2 Wms. Saund., 50, 51, n. 4, and 72, n. 3; 16 Mass., 193, n. 2; 1 Cow., 738.

The writ, however, must be in form against both, to correspond with the record, but it could be executed against the goods of the survivor only; or, on making a suggestion of the death upon the record, the writ could be against the survivor alone. *Ibid.* And if the judgment against both defendants is founded upon contract, the surviving defendant is entitled to contribution out of the estate of the deceased (Bing. on Ex., 137, and cases cited); if upon tort, it would be otherwise.

But since the statute, if the plaintiff seeks to enforce the judgment against

the real estate of the defendants in the case put, he must revive it by *scire facias* against the surviving defendant, and the heirs, devisees and terre-tenants of the deceased, before execution can regularly issue. For, as to the real estate of the defendants, the charge of the judgment does not survive; and the execution must go against the lands of both; and as it cannot be regularly issued against the deceased co-defendant, nor be allowed to charge the estate in the hands of his heirs, devisees, or terre-tenants, until they have notice, and an opportunity to set up a defense, if any, to the judgment, a *scire facias* is indispensable to the regularity of the execution. 2 Wms. Saund., 51, n. 4; Bing. on Ex., 137, and cases cited; 4 Mod., 316; 2 Co., 14, a; 1 Ld. Raym., 244; S. C., 1 Salk., 320; S. C., Carth., 404; 16 Mass., 193, n.; 1 Cow., 711.

It will be seen, therefore, upon these authorities, that the same objections exist, both in principle and in reason, as it respects the enforcement of a judgment against two by a sale of the real estate on execution after the death of one, which have been shown to exist against the enforcement of a judgment against a single defendant after his death. For, as the charge of the judgment against the lands does not survive, but continues upon the lands of both after the death of one, the same as before, and cannot be enforced against the real estate of the survivor alone, as in the case of the personalty, and the execution must, therefore, be issued against both, if issued at all, it is obvious the lands of the deceased, in that event, are as liable to be sold by the sheriff as the lands of the survivor. The rights of the heirs and devisees, and the reasons for protecting them by the *scire facias*, are the same in the one case as in the other; and when the law disables the plaintiff from suing out execution against the real estate on a judgment against one defendant after his death, it must equally disable him from suing it out on a judgment against two, after the death of one. Otherwise, in both cases, the interest of new parties, upon whom the estate has fallen, or to whom it may have passed, is liable to be suddenly, and without notice, divested by the silent, and till then dormant, power of the law; parties, too, who from their age and situation in life will not unfrequently be the least qualified to understand and protect these interests, being the children of the deceased defendant.

This writ of *scire facias* is also made necessary, in order to secure the judgment in cases where the plaintiff has neglected to take out execution within the year. And yet it has always been held, that, if taken out after the year, the sale under it is valid, and the title of the purchaser protected. The execution is not void, but voidable, and may be regularly enforced, unless set aside on motion. In analogy to this course of decision, it has been argued that an execution issued after the death of the party should not be considered void, and the sale under it a nullity, and that the only remedy should be on a motion to set it aside.

Before the statute of Westm. 2, already referred to (ch. 45), if the plaintiff had neglected to take out execution within the year, his only remedy was an action of debt on the judgment. The law presumed it had been satisfied, and, therefore, drove the plaintiff to a new original. 2 Tidd, 1102; 1 Bing. on Ex., 123, n. This statute extended to him the writ of *scire facias*, by means of which the judgment could be enforced after the year by execution, and as the writ could thus be issued after the year by a *scire facias*, the judges held, if issued without, and the defendant did not interpose and set it aside, it was an implied admission that the judgment was unsatisfied, and existed in full force. The issuing, under the circumstances, was regarded simply as an irregularity

which it was competent for the party defendant to waive. It is apparent that the analogy between this class of cases and the one under consideration is exceedingly remote and feeble, and that they stand upon different and distinct grounds, and the conclusions arrived at upon substantially different and distinct considerations.

Another ground has been urged in support of the sale in this case which deserves notice. It has been argued that the grantees of lands sold on a judgment against the grantor, or previous owner, through whom the title was derived, where the sale confessedly would be valid, stand upon the same footing as the heirs or devisees in the case of a sale after the death of the defendant.

But the distinction between the two cases is manifest. In the first place, the grantee, in making the purchase, is presumed to have made the proper inquiry into the nature and validity of his title, and therefore to have known of the existence of the incumbrance, and to have taken the necessary precautionary measures against it. The sale on the execution cannot take him by surprise with ordinary attention to his rights. And, in the second place, the defendant in the execution, not the grantee, is the party most deeply interested in the proceeding; for if his grantee or any succeeding grantee under the title should be dispossessed by reason of a sale on a prior incumbrance by judgment, he, the defendant in the execution, would be answerable over upon his covenants of title.

The grantee, therefore, is neither exposed to a sale under the judgment by surprise, nor is he the party usually interested in the sale. Upon the whole, without pursuing the examination further, we are satisfied that according to the settled principles of the common law, and which are founded upon the most cogent and satisfactory grounds, the execution having issued and bearing *teste* in this case after the death of one of the defendants it was irregular and void, and that the sale and conveyance of the real estate of the deceased under it to the plaintiff was a nullity.

We may further add, that since this suit was commenced, and while it was pending in the circuit court of the United States, the highest court in the state of Alabama have had the same question before them, and have arrived at a similar result. 6 Ala., 657. Judgment of the circuit court affirmed.

#### MITCHELL v. ST. MAXENT.

(4 Wallace, 237-244. 1866.)

ERROR to U. S. District Court, Northern District of Florida.

STATEMENT OF FACTS.—Judgment was obtained against St. Maxent, and after his death a *fi. fa.* issued and was levied on the land in question. Proceedings were stayed by injunction, but afterwards a *fi. fa.* issued, under which the lands were sold to Mitchell.

§ 1479. *Fieri facias* issued after death of a party against whom judgment was rendered is a nullity.

Opinion by MR. JUSTICE DAVIS.

The solution of one question presented by the record is decisive of this case. Does the writ of *fieri facias*, tested and issued after the death of a party against whom the judgment is rendered confer power on the ministerial officer to execute it? That St. Maxent was the owner of the lands in controversy at the time of his death, and the plaintiffs below are his heirs at law, is admitted; but it is claimed that the title was divested by certain proceedings in attachment

against him in the courts of Florida, which ripened into a judgment while he was alive. It is a well-settled principle of law which has often received the sanction of this court, that the decree or judgment of a court having jurisdiction is binding until reversed and cannot be collaterally attacked. But the defect in this case occurs after the judgment, and is fatal to Mitchell's title, for purchasers at a judicial sale are not protected if the execution on which the sale was made was void. Void process confers no right on the officer to sell, and all acts done under it are absolute nullities.

The writ of *feri facias* on which Mitchell rests his title was tested after the death of St. Maxent, and, according to a familiar rule of the common law it was therefore void. The death of a defendant, before the test of an execution, compels the plaintiff to sue out a writ of *scire facias*, "for the alteration of the person altereth the process." Bac. Abr., title "Scire Facias." The heirs, devisees and terre-tenants of the deceased must have notice before an execution can regularly issue, for they are the parties in interest, and should have an opportunity to interpose a defense, if any they have, to the enforcement of the judgment. *Erwin v. Dundas*, 4 How., 58 (§ 1478, *supra*), is an authority in point, and it is unnecessary to refer to any other.

But it is contended that the doctrines of that case have been overturned by the decision of *Taylor v. Doe*, reported in 13th Howard. This is an erroneous view of that decision. The court held, in that case, that it is not necessary to revive a judgment by *scire facias*, where an execution regularly issued during the life of the defendant had been levied on land, but that the officer who had made the levy could proceed to sell under a *venditioni exponas*. That writ was regarded as a completion of the previous execution, by which the property had been appropriated, and not as an original or independent proceeding. It was in the power of the legislature of Florida to have changed the rule on the subject of the test of process; but, having failed to do it, and having adopted the common law of England, the question in issue must be decided by the rules of the common law. *Laws of Florida, 1822 to 1825*, p. 136.

§ 1480. *Executions in attachments under Florida law are ruled by the common law.*

But it is insisted that the rules of the common law only attach to suits prosecuted in the ordinary way, and do not apply where the proceedings are commenced by seizing property under a writ of attachment. This is a novel view, for the law of attachment, being in derogation of the common law, courts are not inclined to extend its provisions beyond the requirements of the statute authorizing it. In Florida the service of the writ of attachment binds the property, and retains it in custody of the law, for the benefit of the attaching creditor, if he obtains a judgment and execution, and the property is to be disposed of as in other cases of property levied upon and taken in execution. *Id.*, 1823, p. 40.

As an execution is required, and the law is silent about the manner of its issue, it follows that it is to be tested and issued as writs of *feri facias* are on judgments obtained through the usual methods of the common law. The judgment of the court below is affirmed, with costs.

§ 1481. *When complete.*—An execution is never completed until the money is made and paid to the plaintiff, if it be practicable to make it. *McFarland v. Gwin*, 8 How., 717.

§ 1482. *Without authority, void.*—An execution issued without authority of law is absolutely void. *Smith v. Bank of Columbia*, \* 4 Cr. C. C., 148.

§ 1483. Form, conformable to state practice.— Under the act of congress admitting the state of Kansas, and the act of 1838, relating to mesne process in states admitted to the Union since 1783, the federal court of Kansas had the right to issue execution on a judgment rendered therein, but in issuing and levying under it conformity must be had to the state practice. *Smith v. Cockrill*, 6 Wall., 756.

§ 1484. At common law, a party for whom judgment is rendered may have a writ of *fiery facias* or *elegit*, or *levari facias*, or *capias ad satisfaciendum*, at his option; or he may have all in succession until his judgment is satisfied. *Dobbin v. County of Allegheny*,\* 2 Pittsb. R., 120.

§ 1485. It is within the discretion of the federal courts to adopt a part only of the state law as to the execution of final process. *Ibid*.

§ 1486. The act of congress delegating to the courts the power to regulate their process and proceedings by reference to state laws, and to change and modify the same from time to time, is constitutional. *Oelrichs v. Pittsburgh*,\* 2 Pittsb. R., 93; *Dobbin v. County of Allegheny*,\* 2 Pittsb. R., 120.

§ 1487. The form of executions from the federal courts (except the style), their force and effect, and the duty of the marshal in levying, advertising and selling, are to be ascertained by reference to the laws of the respective states as they were at the date of the passage of the act of congress of 19th of May, 1838 (adopting the process of the state courts then in use), except where changes by state legislation have been adopted by rule of court. *Oelrichs v. Pittsburgh*,\* 2 Pittsb. R., 93.

§ 1488. Construction of state statute by federal courts.— The federal courts adopt the construction placed upon a state statute upon the subject of executions by the highest court of that state. *United States v. Morrison*,\* 4 Pet., 124.

§ 1489. *Lis pendens*.— The mere citation of a judgment debtor to appear for an examination touching his property, under the Ohio code, does not constitute a *lis pendens* so as to prevent him from mortgaging his property. *Gregory v. Hewson*,\* 1 Bond, 277.

§ 1490. Amendment.— Both by the English cases and by the act of 1789, chapter 20, section 82, providing that the courts of the United States "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as said court respectively shall in their discretion and by their rules prescribe," an execution which is irregular because issued in the name of two plaintiffs after the death of one of them may be amended, when the matter is properly brought before the court upon motion. *Lane v. Beltzhoover*,\* Taney, 110.

§ 1491. Mistake in judgment.— Where, by mistake, judgment was entered against William McKenney, the court refused to order execution against Samuel McKenney, the party against whom judgment ought to have been entered. *The Bank v. McKenney*,\* 3 Cr. C. C., 173.

§ 1492. Arrest of.— Where a decree is satisfied, the execution should be arrested on motion and not by a new bill in equity. *Molyneux's Administrator v. Marsh*, 1 Woods, 452.

§ 1493. Within what time.— Under section 23 of the judiciary act of 1789, execution cannot issue until the expiration of ten days after judgment has been rendered, and if it issues the court will set it aside on motion. *Bobyshall v. Oppenheimer*, 4 Wash., 388.

§ 1494. A judgment may be kept alive by taking out a *fiery facias* within the year and day, to lie in the office, and so from year to year; and a *fi. fa.* taken out within the last year and day, and put into the marshal's hands, may be executed, and, if returned *nulla bona*, a new execution may at any time thereafter be taken out without *scire facias*. *Ott's Adm'r v. Murray*, 3 Cr. C. C., 323.

§ 1495. If execution issue before the end of the term in which the judgment was rendered, it may, on motion, be quashed and the judgment rescinded. *Sharpless v. Robinson*, 1 Cr. C. C., 147.

§ 1496. It is no objection to a *fiery facias* that more than a year and a day have elapsed since the rendition of the judgment, if the judgment has been kept alive by proper process. *Lane v. Beltzhoover*,\* Taney, 110.

§ 1497. An execution issued more than a year and a day after the judgment, without a *scire facias* to warrant it, is irregular and should be set aside. It is otherwise if the execution is regularly continued. *Azcarati v. Fitzsimmons*,\* 3 Wash., 134.

§ 1498. Countermand of.— The plaintiff has no authority to countermand an execution after it is issued. Nor has the clerk any authority to issue a new execution after the first has been countermanded by the plaintiff. *Smith v. Bank of Columbia*,\* 4 Cr. C. C., 143.

§ 1499. When an execution is countermanded at the request of the defendant and for his accommodation, the plaintiff may have a new execution, after the year and day, without *scire facias*. *Phillips v. Lowndes*, 1 Cr. C. C., 283.

§ 1500. If the plaintiff has countermanded his execution at the request of the defendant to give him time, or if he has been delayed by injunction obtained by the defendant, he may take



out a new execution after the expiration of the year and day. *Muncaster v. Mason*, 2 Cr. C. C., 521.

§ 1501. *May issue pending a writ of error.*—The United States supreme court will not quash an execution issued by the court below to enforce its decree pending the writ of error, if the writ of error be not a *supersedeas* to the decree. *Wallen v. Williams*, 7 Cr., 278.

§ 1502. *Pending motion to open a default.*—An execution is not void which is issued pending a motion to open a default, and will not be set aside if the motion is overruled. *Dawson v. Daniel*,\* 8 Cent. L. J., 185.

§ 1503. *Pending motion for new trial.*—An execution issued pending a motion for a new trial which has been continued, though premature, is not void, and especially where it is expressly ruled in the order of continuance that it is not to operate to the prejudice of the plaintiff. *Dawson v. Daniel*,\* 2 Flip., 305.

§ 1504. *In whose name.*—When the lessor of the plaintiff dies after judgment in ejectment, the execution may issue in the name of the lessee of the plaintiff, without the necessity of a *scire facias*. *Lessee of Penn v. Klyne*, Pet. C. C., 446.

§ 1505. *After the conveyance to a third person of land which has been recovered in ejectment, a scire facias and a habere facias must issue in the name of the plaintiff in the original judgment.* *Ibid.*

§ 1506. *Against an administrator.*—In Alexandria, D. C., an execution *de bonis propriis* is the proper process against an executor upon a decree in equity for the balance of his administration account. *Catlett v. Fairfax*, 2 Cr. C. C., 99.

§ 1507. *Against municipal corporations.*—No execution can issue against a municipal corporation, but judgment may be enforced by compelling the levy and collection of a tax, and that even after a lapse of time sufficient to limit the lien of a judgment on real estate. *Amy v. City of Galena*, 7 Fed. R., 163.

§ 1508. *Against collector.*—On a judgment recovered against a collector for duties wrongfully exacted and paid under protest, execution may be issued against the collector personally. *Knoedler v. Schell*,\* 20 How. Pr., 216.

§ 1509. *Against a county.*—On a judgment being obtained against a county the supervisors are required to levy the amount on the people of the county. *Lyell v. Board of Supervisors of St. Clair Co.*, 8 McL., 580.

§ 1510. *An execution against two only, upon a judgment against three, is erroneous, not irregular; voidable, not void.* *Derlin v. Gibbs*, 4 Cr. C. C., 626.

§ 1511. *An execution against two only, upon a judgment against three, without a suggestion of the death of one, is void on its face.* *Ex parte Kenneady*, 4 Cr. C. C., 462.

§ 1512. *By mortgagee on land mortgaged.*—By the law of Maine a mortgagee may extend on the land mortgaged an execution issuing on a judgment for the debt secured by the mortgage. *Cogswell v. Warren*, 1 Curt., 223.

§ 1513. *After death of co-plaintiff.*—An execution in the name of two plaintiffs, but issued and bearing *teste* after the death of one of them, is irregular. *Lane v. Beltzhoover*,\* Taney, 110.

§ 1514. *After death of debtor.*—An execution issued on a judgment in Illinois after the death of the debtor, without the notice required by statute, or the revival of the judgment by *scire facias*, is void, though issued by order of the court. *Ransom v. Williams*, 2 Wall., 813.

§ 1515. *A new or original fieri facias cannot issue after the death of the defendant without first reviving the judgment against his representatives.* *Wilson v. Hurst*,\* Pet. C. C., 140.

§ 1516. *A fi. fa. issued after the death of the defendant will not be quashed if it bear teste before his death.* *Kane v. Love*, 2 Cr. C. C., 429.

§ 1517. *For deficiency.*—Where it is not authorized by a rule of court an execution cannot issue to collect a deficiency remaining after the application of the proceeds of the sale of mortgaged premises to the payment of the mortgage debt. *Orchard v. Hughes*, 1 Wall., 73.

§ 1518. *Enforcement of decrees for money.*—The court will not issue an attachment upon a decree for payment of money, but will leave the complainant to his remedy by *fi. fa.* or *ca. sa.* *White v. Clarke*, 5 Cr. C. C., 401.

§ 1519. *On undivided part of mill.*—Until the statute of Massachusetts of 1818, chapter 15, there was no legal means of levying an execution upon an undivided part of a mill and its appurtenances, where the execution debtor was the owner of the entirety of the mill. *Gordon v. Lewis*, 1 Sumn., 525.

§ 1520. *On equity of redemption.*—A United States circuit court will not, on motion, quash the return of a *fi. fa.* levied upon an equity of redemption. *Warfield v. Wirt*, 2 Cr. C. C., 102.

§ 1521. *On judgment for penalty.*—A judgment being entered on the penalty of a bond to save harmless the creditors of a certain firm, by paying the amount due or to become due, may be enforced by *sci. fa.* on the judgment, to show cause why execution should not issue, etc. *Bergen v. Williams*, 4 McL., 125.

§ 1522. When the judgment is for a penalty to be released on the payment of a smaller sum, that sum must be ascertained before the execution can be issued. *Fitzhugh v. Blake*, 2 Cr. C. C., 37.

§ 1523. An execution upon a *supersedeas* judgment, confessed more than two months after the date of the original judgment, will be quashed. *Chesapeake & Ohio Canal Co. v. Barcroft*, 4 Cr. C. C., 659.

§ 1524. The United States circuit court will, on motion, quash an execution upon a *supersedeas* judgment, and also the *supersedeas* judgment itself, if it does not truly recite the original judgment. *McSherry v. Queen*, 2 Cr. C. C., 406.

§ 1525. It is no bar to execution upon a *supersedeas* in Washington county, Maryland, that the plaintiff has recovered another judgment in Alexandria county upon the same cause of action, if it be not satisfied. *Curry v. Lovell*, 1 Cr. C. C., 80.

§ 1526. Action to try the right to money received on execution.—Money made on execution by sale of lands was paid to the judgment creditor upon an agreement with another judgment creditor that it should be paid over to the latter, if the court upon a case stated should decide that he was entitled to it. It was held that an action of *assumpsit* would lie by the latter creditor against the former, to try the right and for recovery of the money, the agreement as to stating a case for the decision of the court not having been carried out by either party. *United States v. Mechanics' Bank*, \* *Gilp*, 51.

§ 1527. Appraisement.—Under the statute of Massachusetts of the 17th of March, 1784, requiring real estate taken upon execution to be appraised, and that the execution shall be returned into the clerk's office with the doings thereon, there need be no certificate by the appraisers that they were freeholders, or of their appraisement, or of their doings in the premises. *United States v. Slade*, \* 2 *Mason*, 71.

§ 1528. Where a statute requires appraisers of property taken in execution to be sworn, affirmation is not sufficient. *Ibid*.

§ 1529. Where a statute requires property taken in execution to be appraised by all of the appraisers appointed, an appraisement by less than all is not sufficient. *Ibid*.

§ 1530. Receipt by officer of depreciated paper—Practice.—There is inherent in every court a power to supervise the conduct of its officers in the execution of its judgments and process. And where the return of the marshal upon an execution placed in his hands shows the receipt by him of depreciated bank-paper, which the creditor is not bound by law to receive, in satisfaction of that process which ordered him to collect money, such acts are unauthorized and illegal and void, and the return should, upon the complaint of the judgment creditor, be quashed, and an *alias* execution issued. The marshal cannot be considered as the agent of the judgment creditor with the power to bind him by receipt of depreciated bank-notes instead of money. *Griffin v. Thompson*, \* 2 *How.*, 244; *Buckhannan v. Tinnin*, \* 2 *How.*, 258.

§ 1531. Acquiescence of the plaintiff in a judgment in the conduct of the marshal in accepting depreciated bank-notes in part satisfaction of the execution may be inferred from the lapse of time before the motion is made to quash the return and other circumstances. The lapse of more than two years without objection on the part of the plaintiff, and the fact that the language of the return implied acquiescence in the conduct of the marshal at the time, and objection only to the collection of the residue of the execution at that time, were held in this case to be binding upon him, and the return was sustained. *Ibid*.

§ 1532. Distress warrant.—An execution is the end of the law. It gives the successful party the fruits of his judgment, and the distress warrant is a most effective execution. It may act on the body and estate of the individual against whom it is directed. *United States v. Nourse*, 9 *Pet.*, 8.

§ 1533. Appointment of receiver.—On a judgment rendered against a toll bridge company the court may, after an execution returned *nulla bona*, appoint a receiver of the tolls and direct them to be paid into court to satisfy the judgment. *Covington Drawbridge Co. v. Shepard*, 21 *How.*, 112.

§ 1534. Order must be under seal.—Where the statute requires that an order of sale on foreclosure shall be under seal, an unsealed order is void. *Insurance Co. v. Hallock*, 6 *Wall.*, 556.

§ 1535. Discharge under insolvent laws.—If a debtor, after being sued in a United States court, takes the benefit of the insolvent laws of Massachusetts, he is entitled under the acts of congress as to imprisonment for debt to have execution issue against his property alone. *Moen v. Wilmarth*, 3 *Woodb. & M.*, 399.

§ 1536. Where a party arrested on final process is released on giving bond to apply to be discharged as an insolvent, and if unsuccessful to surrender himself again, it is not a satisfaction of the execution. *Ex parte Rank*, *Crabbe*, 493.

§ 1537. The United States circuit court will not on motion quash a *ca. sa.* issued by the clerk of that court upon a judgment of a justice of the peace, upon the ground that the defend-

ant had applied for the benefit of the insolvent laws of Maryland and had obtained an order, and given bond for his appearance in St. Mary's county, Md., but had not yet obtained his final discharge. *Mattingly v. Smith*, 2 Cr. C. C., 158.

§ 1538. *Stipulation as to amount, broken.*—Where the judgment of a lower court is affirmed in the supreme court for a less amount than its face, by an agreement of the parties, and a condition in such agreement is not fulfilled by the judgment debtor, the judgment creditor may have execution for the full amount of the judgment. *Early v. Rogers*,\* 16 How., 599.

§ 1539. *In admiralty.*—On decree in admiralty the libellant may have an attachment or *capias* against the person of the defendant, or a *feri facias* against his goods and chattels. These are the only writs, and the only mode in which decrees in admiralty can be executed. There can be no execution against the defendant's land, but there may be a bill for discovery in equity, if other means are tried unsuccessfully. *Ward v. Chamberlain*,\* 9 Am. L. Reg., 171.

§ 1540. Under the supreme court rules, execution goes against stipulators in admiralty upon decree against the principal; the parties subjecting themselves, by force of their undertaking, to abide and fulfill the decree against the principal. *Gaines v. Travis*, Abb. Adm., 422; S. C., 8 N. Y. Leg. Obs., 45.

§ 1541. Under the act of July 4, 1840, the real estate of sureties in admiralty is subject to execution on decrees. *The Kentucky*, 4 Blatch., 448.

§ 1542. In New York stipulators in admiralty are not liable to imprisonment on execution on the decree rendered against the claimant and his sureties. *Ibid.*

§ 1543. Under the rules of the district court, a stipulation includes a consent that execution may issue against all the estate of the stipulators. The claimant is not precluded from using any other remedy, as a *ca. sa.*, by having issued a *fi. fa.* *Steamboat Delaware, Olc.*, 240.

§ 1544. In cases of garnishment in admiralty the libellant may, on default of the garnishee, have execution against the debts, effects and credits in the hands of the garnishee, if without the answer of the garnishee he can show that he has said property in his hands. *Shorey v. Reunell*, 1 Spr., 418.

§ 1545. *Enforcement of decrees by courts of equity.*—*Held*, where a bill was filed seeking discovery as to the title to land levied on by an execution and the enforcement of a decree in admiralty, that equity would interfere to remove a cloud from the title to such land, but would not enforce such decree, and order the lands sold and the proceeds applied as prayed for by the bill. *Ward v. Chamberlain*, 2 Black, 490 (§§ 926-29).

§ 1546. Assuming the rule to be that a court of equity will not decree a sale of real estate to satisfy a judgment where the rents and profits would discharge it in a reasonable time, it is held that this rule does not apply where the rents and profits will not satisfy the judgment within a reasonable time or in a long time. *Burton v. Smith*, 18 Pet., 464 (§§ 951-53).

§ 1547. The circuit court of Tennessee, as a court of equity, cannot award a writ of *habere facias possessionem* to enforce its decree. *Wallen v. Williams*, 7 Cr., 602.

§ 1548. Where property placed in the hands of a receiver of the court pending a suit in equity is by final order decreed to belong to one of the parties to the suit, and to be delivered to him upon demand, it is according to the equity practice under such a decree to make the demand under a certified copy of that part of the decree authorizing the demand and requiring the surrender of the property, with a receipt upon it by the party demanding or his attorney that the property has been surrendered. Upon the return of such a certificate the court will direct it to be filed as a voucher for the protection of the receiver from further responsibility, and as evidence of the execution of the decree. Such a course is not a mere form to be followed at option, but a precautionary requirement to prevent further litigation. *Very v. Watkins*,\* 28 How., 469.

§ 1549. *On order of affirmance.*—When an appeal in admiralty is taken from the district court to the circuit court, an execution cannot be issued upon a mere order of affirmance and without any award of recovery. *Harris v. Wheeler*,\* 8 Blatch., 81.

§ 1550. *Powers of district courts.*—The act of congress of March 8, 1863, giving to district courts which had been deprived of circuit court powers by a former act the power to issue writs of execution or other final process, and use other powers and proceedings according to law, to enforce final judgments and decrees rendered while exercising such powers, gave such district courts only such powers as might be necessary, after issuing execution or other final process, in order to insure the execution of the process and to regulate and control the ministerial duties of officers in executing it. *Bronson v. La Crosse Railroad Co.*, 1 Wall., 405.

§ 1551. *Imprisonment of debtor.*—The body of a private debtor, when he is sued in the United States courts, is imprisoned or not, on execution, according to the laws and policy of each state where the execution issues, whilst that of a debtor to the United States is governed by the uniform and fixed laws of congress. *Moon v. Wilmarth*, 3 Woodb. & M., 399.

§ 1552. Under the laws of Oregon the plaintiff has until the return of the execution against the property of the defendant to take out execution against his body, and in the meantime, if

the defendant has been arrested provisionally, he must remain in the custody of the sheriff or of his bail, or satisfy the judgment. *Norman v. Manciette*, 1 Saw., 484.

§ 1553. The question whether the defendant in an action by the United States to recover the value of goods fraudulently imported is liable to imprisonment on an execution on a judgment rendered against him therein is determined by the law of the state in which the action is brought. *United States v. Moller*, 10 Ben., 189.

§ 1554. Under the laws of New York a defendant in an action by the United States to recover the value of goods fraudulently imported is not liable to imprisonment on execution on the judgment against him therein. *Ibid.*

§ 1555. The jurisdiction of a court in an action does not end with the judgment, but continues until it is satisfied. A commitment on execution, and giving bond for gaol liberties, are not a satisfaction of the judgment. Even after discharge a *feri facias* may issue in order to obtain satisfaction. *Campbell v. Hadley*, 1 Spr., 470.

§ 1556. Under the rules of the supreme court the principal and his surety upon a bond or stipulation given on an arrest *in personam* are upon the same footing, and summary execution may be issued against each to enforce the final decree, and no order on the surety to show cause is necessary. *Holmes v. Dodge*, Abb. Adm., 65.

§ 1557. If a debtor be taken on a *ca. sa.* in the District of Columbia, and give a prison bounds bond, upon which also a judgment is rendered against him, he may be retaken on the original *ca. sa.* after the expiration of a year from the date of the bond and committed to close custody in execution. *Owen v. Glover*, 2 Cr. C. C., 522.

§ 1558. If a defendant is brought in upon a *ca. sa.*, and not committed in execution, and the execution "not called by consent," it seems that the plaintiff cannot have another execution. *Foyles v. Law*, 3 Cr. C. C., 118.

§ 1559. In Virginia if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both. *Peyton v. Brooke*, 3 Cr., 92.

§ 1560. Upon surrender of the debtor upon a *ca. sa.*, the court will not, without motion, order him to be committed in execution. *Peter v. Suter*, 1 Cr. C. C., 311.

§ 1561. It is a long established principle of the common law that a man shall not be twice taken in execution for the same cause. This principle is as applicable to the United States as to other creditors; and under the Maryland law is as applicable to a *ca. sa.* for a fine as to a *ca. sa.* for any other debt. *United States v. Watkins*, 4 Cr. C. C., 271.

§ 1562. — release of bail.— A discharge of the appearance bail, arrested upon a joint *ca. sa.* against him and his principal, does not release the principal. *Watson v. Summers*, 1 Cr. C. C., 200.

§ 1563. Liability of bail.— The act of the legislature of Arkansas of October 26, 1825, provides "that any person who shall become special bail for any defendant against whom judgment may be rendered, so as to entitle such defendant to stay of execution, such bail shall, before the justice of the peace, acknowledge himself jointly bound with such defendant in the full amount of such judgment and costs, which judgment the justice shall enter upon the docket, and at the time limited for the stay of execution shall issue execution against the principal, and if the principal shall not satisfy the execution, and if the bail shall not show property, and the constable cannot find property of the principal to satisfy the execution, then, and in either case, it shall be the duty of the constable to return said execution to the justice within twenty days of the date thereof, whose duty it shall be to issue *scire facias* against such bail, requiring him to show cause why execution should not forthwith issue against him for the judgment and costs aforesaid; and if he fails to show sufficient cause, the justice shall issue execution against both principal and bail." Under this statute, the bail becomes jointly bound for the amount of the judgment, and if it cannot be made on execution against the principal his liability is fixed, and nothing can discharge him except payment of the judgment. Neither the failure to return the execution within twenty days nor the issuing of several executions against the principal will discharge the bail. *Wilson v. Eads*,\* *Hemp.*, 284.

§ 1564. Release of surety.— After an instrument upon which both the principal and surety are bound is reduced to a judgment, the suretyship is merged in the judgment and the relation and its consequences cease to exist; and if the owner of the judgment procures a levy of the execution upon the land of the principal to be set aside, this does not release the surety or prevent a levy upon his property. *Gault v. Woodbridge*,\* 4 McL., 329.

§ 1565. Quashing.— An execution upon an exemplification from Maryland, against a person not resident nor having property within the District of Columbia, will be quashed on motion. *Sherrard v. Ponsonby*, 1 Cr. C. C., 131.

§ 1566. An execution issued on a judgment which does not authorize it may be quashed on motion, and the money made thereon ordered to be refunded; but where there is only a clerical mistake, this cannot be done, for the execution may be corrected by the court, so as to conform to the judgment. *Murphy v. Lewis*, *Hemp.*, 17.

§ 1537. An execution cannot now be quashed at an existing term of the court which is not returnable until the term following. *Linthecum v. Jones*, 4 Cr. C. C., 572.

§ 1568. By Bank of Columbia without judgment.—Under the fourteenth section of the charter of the Bank of Columbia, authorizing its president to issue executions on notes without first obtaining judgment, such an execution bound the lands and goods of the debtor from the time of its delivery to the marshal if it bound them at all. *Smith v. Bank of Columbia*,\* 4 Cr. C. C., 143.

§ 1569. The Bank of Columbia once had authority to issue executions without obtaining judgment, but this power was taken away by act of congress except as to debts contracted prior to the passage of such act. It is held that by taking new notes subsequent to the act, for old debts contracted prior to the act, the bank relinquished the summary remedy annexed to the old debt. *Ibid.*

§ 1570. That provision of the charter of the Bank of Columbia which authorizes the president to cause execution to issue on notes due it without a judgment, being in derogation of common right, must be construed strictly, and the execution must show upon its face all the facts which authorize the clerk to issue it. *Ozely v. Boyd*,\* 2 Cr. C. C., 176.

§ 1571. Upon the return of an execution issued by order of the president of the Bank of Columbia, under the fourteenth section of its charter, the court will not quash the execution because it appears on the face of the note upon which it was issued, that it had been due more than three years before the issuing of the execution. *Bank of Columbia v. Cook*, 2 Cr. C. C., 574.

§ 1572. An order for an execution by the president of the Bank of Columbia, under the fourteenth section of its charter, is not a judgment, and a second execution cannot be issued without a new order. *Bank of Columbia v. Baker*, 8 Cr. C. C., 432.

§ 1573. An execution issued by order of the president of the Bank of Columbia without judgment ought not to include the notary's fee for protest, but if the bank releases the fee, the court will not quash the execution. *Bank of Columbia v. Brunnel*, 2 Cr. C. C., 306.

§ 1574. Miscellaneous.—A court may, at a subsequent term, modify the manner of execution directed in a decree, though it cannot change the decree itself in essential particulars. *Turner v. Indianapolis, Bloomington, etc., R'y Co.*, 8 Biss., 330.

§ 1575. In the absence of statutory regulation, only the plaintiff in a judgment, or his attorney or agent, has the power to satisfy it or direct its enforcement by execution. Neither the clerk nor the sheriff can do so unless acting as agent for and under directions from the plaintiff, as they are not parties to the judgment. *Wills v. Chandler*, 1 McC., 276.

§ 1576. Where a consent decree is entered, by which no execution is to be issued if certain specified payments are made, and the payments are not made, execution may issue. *Anderson v. Jacksonville, etc., R. Co.*, 2 Woods, 628.

§ 1577. An execution is a writ within the meaning of the practice act of 1851 of Oregon, and is valid though in it the sheriff is directed "to make due return thereof," instead of being required to return it within thirty days. *Stephens v. Dennison*,\* 1 Or., 19.

§ 1578. Having several judgments for the same trespass, the plaintiff may make his election on which one he will take out execution. *Matthews v. Menedger*, 2 McL., 145.

§ 1579. The act of Pennsylvania of 1870 relating to the sale of the property of a corporation on an execution did not repeal the law of 1836, and a levy made regardless of the earlier act is void. *Fox v. Hempfield R. R. Co.*, 8 Phil. (Pa.), 689; 18 Int. Rev. Rec., 23; 2 Abb., 151.

§ 1580. If, after an attachment upon land, the county is divided and a new county is set off from it, and the land falls within the new county, the sheriff of the old county has no authority to levy the execution issued in the case if issued after the new county is set off. *Kent v. Roberts*,\* 2 Story, 591.

§ 1581. Upon general principles a sheriff is limited in his levies upon real estate to such as is within his county. *Ibid.*

§ 1582. Stay of execution.—Whether the execution of a judgment shall be stayed because the debt is attached by the creditors of the plaintiff by garnishment proceedings is in the legal discretion of the court, and its action in the premises is not reviewable by the supreme court. *Early v. Rogers*,\* 16 How., 509.

§ 1583. The fourteenth section of the charter of the Bank of Columbia, declaring that executions issued by the bank "shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor," was not intended to apply to a stranger to the debt whose property might be seized under the execution. *Smith v. Bank of Columbia*,\* 4 Cr. C. C., 143.

§ 1584. Where a writ of error is sued out and a bail bond given, it operates as a *supersedeas* in England, and also in New York. But in New York the execution is not stayed unless the bail bond is given. *Dawson v. Daniel*,\* 2 Flip., 301.

§ 1585. In a suit upon a judgment of another state, if the plaintiff could have no execution

in such other state on account of a *supersedeas*, the court might well stay proceedings upon a judgment rendered in such suit. But where a writ of error has been sued out to reverse the judgment sued on, and a bail bond is not given; so as to constitute a *supersedeas*, the proceedings will not be stayed, although the writ of error is still pending. *Ibid.*

§ 1586. A judgment in ejectment was recovered against several defendants for different amounts and for different tracts of land respectively. A writ of error was sued out to reverse the whole judgment, and several of the defendants gave bonds to operate as a *supersedeas* as to the judgments against them respectively, and the court ordered that proceedings against them be stayed pending appeal. *Held*, that the enforcement of the judgment as to the defendants as against whom it was thus stayed would not be compelled by *mandamus*. *Ex parte French*, 10 Otto, 1.

§ 1587. A motion for a new trial, or in arrest of judgment, is a waiver of the benefit of a stay of execution agreed upon by the parties. *Brent v. Coyle*, 2 Cr. C. C., 348.

§ 1588. An appeal from the decree of a court of admiralty suspends the effect of the decree from which the appeal is taken. *Penhallow v. Doane*, 8 Dall., 54.

§ 1589. An execution, issued in the court below after a writ of error has been sued out, a bond given, and a citation issued, all in due time, may be quashed either in the court below or the United States supreme court, these things operating as a stay of execution. *Stockton v. Bishop*, 2 How., 74.

§ 1590. When a decree of a United States circuit court is affirmed by the United States supreme court, and a mandate is sent to the circuit court commanding that such execution and proceedings be had in said cause as according to right, justice and the laws of the United States ought to be had, the appeal notwithstanding; and the circuit court makes an order that the defendants, without further delay, perform the decree thus affirmed, with costs, this order is not such a judgment or decree as may be superseded under the Maryland act of 1791, chapter 67. *White v. Clarke*, 5 Cr. C. C., 530.

§ 1591. The provision of the insolvent law of Rhode Island, empowering the supreme court of that state in its discretion to grant a stay of all proceedings against the insolvent debtor, cannot be executed by a United States circuit court; nor can the latter court stay an execution to which a creditor is entitled, upon a showing that the supreme court of the state, in its discretion, has granted a stay of proceedings. In the *Matter of Hopkins*, 2 Curt., 567.

§ 1592. An appeal from a decree for the sale of mortgaged premises did not operate as a stay of proceedings where the bond was simply for costs. *Orchard v. Hughes*, 1 Wall., 73.

§ 1593. Under the acts of congress of September 24, 1789, and March 3, 1803, limiting the time within which an appeal may be taken to ten days, an appeal not taken within the ten days from the order appealed from cannot operate as a stay of execution. *Harris v. Wheeler*,\* 8 Blatch., 81.

§ 1594. If a party appealing or taking a writ of error from a judgment in a federal court desires to stay execution, he must comply within ten days with all the requirements of the statute. The time may be extended before the expiration of the ten days, but if not extended, and nothing is done within the ten days, the execution cannot be stayed. *The Roanoke*, 8 Blatch., 390.

§ 1595. Where a judgment has been rendered against a collector of customs in a charges and commission case for duties overpaid under protest, and the amount has not been paid by the government, the collector may, if execution is issued against him, apply for a certificate that there was probable cause for his acts, and have the execution stayed. Such certificate may be given by another judge than the one before whom judgment was rendered. *Cox v. Barney*, 14 Blatch., 289.

§ 1596. Without an order of the court to that effect neither a petition nor an order for a rehearing stops proceedings under the decree. *Vose v. Trustees of the Internal Improvement Fund*, 2 Woods, 647.

§ 1597. A judgment having been confessed in favor of the United States, the attorney for the plaintiff agreed to stay execution in order to give the defendant an opportunity to obtain such credits as the treasury officers (to whom the subject was by this agreement referred) might think the defendant entitled to. These officers not having acted in the matter, the defendant moved for a rule to show cause why execution should not be stayed, and the defendant be permitted by some means to show credits against the judgment. As the reference was agreed to merely as an indulgence to the defendant, who had no credits to offer which could avail him at the trial, the court refused even to grant the rule, unless the defendant would come forward with a special affidavit stating the credits claimed and the nature of them. *United States v. Wells*,\* 3 Wash., 245.

§ 1598. Alias executions.—Where the marshal makes his return upon an execution that he levied it upon personal property and sold it for a certain sum, which leaves a balance on the judgment unsatisfied, and says there is no other personal property out of which he can make

the residue, the plaintiff may procure an *alias* execution. The return of the officer is conclusive, and it is to be presumed that the officer did his duty. *Corning v. Burdick*,\* 3 McL., 183.

§ 1599. The clerk cannot issue a second or *alias* execution upon the same order upon which the first was issued, but must have a new order founded upon a new affidavit. *Smith v. Bank of Columbia*,\* 4 Cr. C. C., 143.

§ 1600. If a United States marshal die, is removed from office, or his commission expires, if he has made a levy another execution must issue to his successor. *Stewart v. Hamilton*, 4 McL., 534.

§ 1601. An *alias* execution cannot be issued until the original execution has been completely executed and returned. If, however, the writ should be lost or accidentally destroyed after it is executed, a return may be dispensed with. *Corning v. Burdick*,\* 4 McL., 183.

§ 1602. Where a levy has been made there can be no *alias* execution until the goods taken shall be sold, and especially where the goods levied on may be sufficient to satisfy the execution. Until the sale shall be made, the execution must be considered as satisfied by the levy. If the property be lost through the negligence of the sheriff or marshal, or if he disposes of the property or any part thereof, in a way not authorized by law, he is personally liable to the party injured, and this does not authorize an *alias* execution. *Ibid*.

§ 1603. Liability of officer.—A motion for judgment against a sheriff for not paying over to the plaintiff money made on an execution may be sustained in the name of the plaintiff, although he has taken the insolvent oath. *Fendall v. Turner*,\* 1 Cr. C. C., 35.

§ 1604. A statute authorizing the plaintiff in an execution, "upon a motion made at the next succeeding general court," to demand judgment against any officer failing to pay over moneys made upon the execution, does not prevent the rendition of such a judgment at a later than the next term succeeding the return of the execution. *Turner v. Fendall*,\* 1 Cr., 116.

§ 1605. The return of an execution levied upon property valued by the officer as equal to the debt is a complete discharge of the debt, unless by sale of the property seized it should appear to be insufficient to discharge the debt. The plaintiff cannot have a new execution; and the marshal is liable to the plaintiff to the amount of the debt, or to the value of the property as returned by him if it be less than the debt, unless he has been prevented by the plaintiff from completing the execution, or the execution be quashed by the court. *Smith v. Bank of Columbia*,\* 4 Cr. C. C., 143.

§ 1606. A constable is not liable for proceeding with an execution, regular upon its face, after the case has been removed to the circuit court by *certiorari*, if he has no knowledge of the *certiorari*, nor unless with knowledge of the *certiorari* he acts maliciously. *Smith v. Miles*,\* Hemp., 34.

§ 1607. To charge an officer with maliciously proceeding with an execution which has been stayed by *certiorari* the form of action is by regular suit and not by motion. *Ibid*.

§ 1608. If a marshal who has several executions in his hands, and has not made thereon money enough to satisfy all of them, undertakes to pay over the money according to the rights of the plaintiffs in the several executions, he acts at his peril, and is liable if he makes any other than a legal application of the money. *Rockhill v. Hanna*,\* 4 McL., 534.

§ 1609. Where a statute requires that the sheriff or marshal shall take none but freeholders upon the bond given by an execution debtor to replevy the judgment and stay the execution, the officer is liable for taking a surety who is not a freeholder if he proves to be irresponsible. *Bispham v. Taylor*,\* 2 McL., 355.

§ 1610. By the laws of Alabama, where property is taken in execution, if the sheriff does not make the money, the plaintiff is allowed to suggest to the court that the money might have been made with due diligence, and thereupon the court is directed to frame an issue in order to try the same. *Chapman v. Smith*, 16 How., 114.

§ 1611. If a delivery bond be not taken, property levied on is at the risk of the officer; it is his own so far that he may bring an action to recover it, or for any injury to it, and he is responsible for its forthcoming to answer the execution. *Campbell v. Pope*, Hemp., 371.

§ 1612. The officer cannot justify under a *fi. fa.* without producing it. *United States v. Baker*, 1 Cr. C. C., 268.

§ 1613. If the plaintiff in a judgment direct the deputy marshal to receive in payment of the judgment anything but legal tender money, the deputy in so doing is acting as the agent of the plaintiff and not under the authority of the marshal as his deputy, and the marshal is not liable to the plaintiff for any loss occasioned by the act done in pursuance of his instructions, nor for any act of the deputy in disobeying such instructions. *Gwinn v. Buchanan*,\* 4 How., 1.

§ 1614. A marshal who receives bank-notes in satisfaction of an execution, when the return has not been set aside at the instance of the plaintiff, or amended by the marshal himself, must account to the plaintiff in gold or silver. *Gwin v. Breedlove*, 2 How., 29.

§ 1615. Unless otherwise directed by the judgment creditor, the marshal is not authorized

to receive anything in discharge of an execution but gold or silver coin of the United States, and he will render himself liable to the judgment creditor by doing so. *M'Farland v. Gwin*,\* 3 How., 717.

§ 1616. If an execution come into the hands of the marshal or sheriff to be executed, and his term of office expires before he executes it, he is bound, nevertheless, to complete the execution. And all remedies against such officer necessary to compel him to pay over the money he has made survive his term of service and remain in full force against him until the execution shall be completed. *Ibid*.

§ 1617. Where the law gives the defendant in an execution the right to replevy the judgment and suspend the execution for six months upon giving the required bond, a declaration against the marshal upon his bond, framed upon the hypothesis that the marshal is absolutely bound to make the money, is bad. It must also negative the taking of the replevy bond. *Bispham v. Taylor*,\* 2 McL., 355.

§ 1618. A sheriff or marshal is not liable at all events for taking an irresponsible surety upon a bond given by an execution debtor to replevy the judgment and stay the execution. If the surety appears to the world to be a person of responsibility, and the officer uses all the means in his power to ascertain the sufficiency of the surety, he is not responsible. Otherwise if he has knowledge of facts which cast suspicion upon the responsibility of the surety, or neglects to make the proper inquiries. *Ibid*.

§ 1619. Proceedings under execution — Sale — Title of purchaser. — A purchaser at a sale under judgment and execution takes only the right of the debtor at the time of the judgment. A judgment at law does not overreach a prior equity of a third person, *bona fide* acquired for a valuable consideration. *Corporation of Georgetown v. Smith*, 4 Cr. C. C., 91. See SALES.

§ 1620. An execution sale, under a *fi. fa.*, of a partner's interest in the assets of the firm, passes to the purchaser only the defendant's interest in chattels actually seized. *Moore v. Rosenberger*,\* 4 West. Jur., 204.

§ 1621. A purchaser at a sheriff's sale buys precisely the interest which the debtor has in the property sold, and takes subject to all outstanding equities. *Osterman v. Baldwin*, 6 Wall., 116.

§ 1622. In a sale made on behalf of the United States, under section 1 of the act of May 7, 1800, there was no warranty of title, the sale being a judicial one. Neither the marshal nor the auctioneer could bind the United States, and the agreement of the marshal to make title at a future day did not bind the United States, on failure of title, to pay back the money received. *Puckett v. United States*,\* Dev., 103.

§ 1623. Where title under a judicial sale fails because of a want of title in the judgment debtor, the purchaser at such sale cannot recover of the judgment creditor the amount paid. *Puckett v. United States*,\* 4 Am. Law Reg., 459: 19 Law Rep. (9 N. S.), 18.

§ 1624. A judicial sale will be set aside where the mortgage debt for which the sale is made is stated in the notice to be \$2,000,000, with \$70,000 of accrued interest, when in fact the whole indebtedness does not exceed a tenth of that sum. *James v. Railroad Co.*, 6 Wall., 753.

§ 1625. A marshal's sale of land on execution, where the defendant had no interest in the land, will be set aside on motion. *Rocksell v. Allen*, 8 McL., 357.

§ 1626. The United States circuit court will set aside a sale made under its decree, if not fairly made. *Bank of Alexandria v. Taylor*, 5 Cr. C. C., 314.

§ 1627. If an execution be issued on a dormant judgment it is irregular, and the execution may be set aside, on motion; but a title, under a sale, on such execution is good. *Sumner v. Moore*, 2 McL., 59.

§ 1628. Where no fraud or unfairness is alleged, a court will not set aside a judicial sale, on the ground of inadequacy of price. *West v. Davis*, 4 McL., 241.

§ 1629. A judgment of a court of general jurisdiction, having cognizance of a particular case, will protect the purchaser under the judgment, however erroneous it may be. *Bank of the United States v. Voorhees*, 1 McL., 221.

§ 1630. Under the decision of the supreme court of the United States, land must be sold on execution according to the law in force at the time the contract was made. *Rue v. Decker*,\* 3 McL., 575.

§ 1631. Laws regulating sales under execution become a part of the contract, and, under the contract clause of the federal constitution, such sales must be made according to the laws in force at the time the contract was made. *Ibid*.

§ 1632. A law of the state of Indiana, directing "that real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have been first offered for sale at public auction and outcry; and if such rents and profits will not sell for a sum suffi-



cient to satisfy such execution or executions, then the fee-simple shall be sold," is not merely directory to the sheriff, but restrictive of his power to sell the fee-simple. *Gantly's Lessee v. Ewing*, 4 How., 707.

§ 1633. A law of the state of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it will bring two-thirds of its valuation, according to the opinion of three householders, is unconstitutional and void. *McCracken v. Hayward*, 2 How., 608.

§ 1634. Where a suit is brought by a bondholder in behalf of himself and other bondholders against a canal company to have the amount due therein declared a lien on the property and for a sale, the decree should not provide for the sale of the property to satisfy the plaintiff's claim alone, but should give the other bondholders of the same class equal privileges. *Trustees of Wabash, etc., Canal Co. v. Beers*, 2 Black, 448.

§ 1635. Where a levy and inquisition were set aside by the court, but the *feri facias* not set aside, a new inquisition was held and returned with the *feri facias* and levy annexed, condemning the property; a *venditioni exponas* was issued, the property sold and deed acknowledged by the marshal in open court. Held, that the validity of the sale was not affected by the want of an *alias feri facias* or a new levy. *Thompson v. Phillips*, 1 Bald., 246.

§ 1636. The doctrine that all persons are bound by a decree in admiralty does not apply to persons who purchase the property pending an appeal, under an order of sale by the lower court. *Jones v. Walker*,\* 2 Hayw. (N. C.), 291.

§ 1637. If chattels are sold on an execution, the regularity of such sale cannot be contested by mere strangers. *Meeker v. Wilson*, 1 Gall., 419.

§ 1638. After the marshal is commanded by the writ to bring the money, the proceeds of a sale, into court, he may pay it to the plaintiff on the execution, on his responsibility, for the right of the plaintiff to receive it. *Wortman v. Conyngham*, Pet. C. C., 241.

§ 1639. A purchaser under an execution against the grantor has a right to show the deed to be fraudulent as to the creditor under whose execution he purchased. *Middleton's Lessee v. Sinclair*, 5 Cr. C. C., 409.

§ 1640. Where real estate is in the custody of a receiver appointed by a court of chancery, a sale of the property under an execution issued by virtue of a judgment at law is illegal and void. *Wiswall v. Sampson*, 14 How., 52.

§ 1641. Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator *de bonis non* with the will annexed is appointed, all further proceedings are irregular until the administrator be made a party to the suit. And if execution be issued before this is done, it is unauthorized and void; and no right of property will pass by a sale under it. *Taylor v. Savage*, 1 How., 282.

§ 1642. A sale of land by a marshal on a *venditioni exponas*, after he is removed from office, and a new marshal appointed and qualified, is not void. *Doolittle's Lessee v. Bryan*, 14 How., 568.

§ 1643. A sale of land by the sheriff, under the laws of Maryland, seized under a *fi. fa.*, transfers the legal estate to the vendee by operation of law, and does not require a sheriff's deed to give it validity. *Remington v. Linthicum*, 14 Pet., 84.

§ 1644. If property is seized under a *fi. fa.* before the return day of the writ, the marshal may proceed to sell at any time afterward, without any new process from the court. *Ibid.*

§ 1645. A sale under a judgment against a person against whom process did not issue, who was not notified of the pendency of the action, and against whom no steps were taken to bring into court, is a nullity. *Railroad Co. v. Trimble*, 10 Wall., 367.

§ 1646. The act of congress of March 2, 1867, relating to the publication of advertisements in local papers, did not relate to advertisements of judicial sales in actions between private parties; and such a sale in Louisiana, not advertised as was required by the laws of that state, was held invalid. *Moncure v. Zunts*, 11 Wall., 416.

§ 1647. A sale by a marshal without a decree to sustain it is invalid, and it is doubtful whether an order confirming the sale would validate it. It seems, however, that if an issue had been made by exceptions, or other proper pleading, as to the question whether any particular piece of property had been included in the decree or order of sale, and the court had decided that it was so included, it might be such an adjudication on the construction of the decree as would bind both parties. *Minnesota Co. v. St. Paul Co.*, 2 Wall., 609.

§ 1648. The act of a court in confirming or setting aside a sale made by a commissioner in chancery is not a mere control of the ministerial duties of officers in the execution of final process. *Milwaukee Railroad Co. v. Soutter*, 5 Wall., 660.

§ 1649. The highest bidder at a judicial sale which is adjourned and finally discontinued has no right to insist that the property be ordered conveyed to him, where his bid was not ac-

cepted, and the amount for which the sale was to be made was paid by the owners of the property. *Blossom v. Railroad Co.*, 8 Wall., 196.

§ 1650. An officer conducting a foreclosure sale may, for good cause shown, adjourn the sale. So where a sale was to be made unless a certain sum was paid by the debtors, an adjournment to enable the debtors to procure the money and thus prevent a sacrifice of the property was held proper. *Ibid.*

§ 1651. By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution on the property so transferred upon the ground that the sale was fraudulent and void. He should first bring an action to set the sale aside. *Ford v. Douglas*, 5 How., 143.

§ 1652. Where land is attached on mesne process and judgment rendered, and the property is condemned, and a writ of *venditioni exponas* is awarded, but before the sale thereunder the county in which land is situated is divided and a new county is set off therefrom, and the land falls within the new county, the sheriff may make the sale as though there had been no division of the county. *Tyrell v. Rountree*,\* 7 Pet., 464.

§ 1653. Land sold under execution was redeemable by payment of the money within a year. A certificate of sale was given to the purchaser, who bought as agent for the judgment creditor, but it was left under the control of his attorney. An heir of the judgment debtor wished to redeem, and for that purpose a blank assignment of the certificate of sale was executed by the attorney at the direction of the agent, to be delivered upon payment of the money. The heir obtained from the attorney an extension of time within which to redeem upon giving his note, and received the certificate of sale made over to him. The agent was satisfied with this arrangement, and his principal, the real purchaser, though dissatisfied with it, never disaffirmed it until the land began to rise in value. The land having become a good subject of speculation, the attorney aided in a sale from the purchaser to a third person who knew all the facts. The heir of the judgment debtor failed to pay his note at maturity, but the certificate had been made the subject of sale and speculation by the judgment creditor before that time. The agent also set up claim in himself and sold to one who had knowledge of all the facts, and the latter conveyed to the same person to whom the judgment creditor had sold. This latter person having brought suit in equity to divest the title of the heir, the court held that there had been a combination to deprive the heir of his equity and to use his non-payment of his note as a pretense for doing so, and that the right of the heir of the judgment debtor should be sustained. *Laflin v. Herrington*,\* 1 Black, 326.

§ 1654. A *venditioni exponas* may issue to compel the sale of personalty levied on as well as realty, although in case of a levy upon personalty the officer may go on and sell after a return of the *fieri facias* without a *venditioni exponas*. *Dawson v. Daniel*,\* 2 Flip., 305.

§ 1655. The court will not willingly listen to a motion to quash an inquisition or *venditioni exponas* on the ground that there are some other purchasers unknown to the plaintiff whose lands might have been levied on. *Wilson v. Hurst*,\* Pet. C. C., 140.

§ 1656. When a sale has taken place under a *venditioni exponas* the execution plaintiff is entitled to the money, no matter what kind of a title has been conveyed. *Dawson v. Daniel*,\* 2 Flip., 310.

§ 1657. A writ of *venditioni exponas* issued before the expiration of the year is irregular, and will be quashed on motion and a *supersedeas* thereto ordered. *United States v. Conway*, Hemp., 313.

§ 1658. Under the rules of the district court of the southern district of New York a notice of sale on a *venditioni exponas*, under decree of the court in admiralty, must, except in cases of forfeiture to the United States, be published for six days continuously before the sale, and a sale on a publication for a less number of days is invalid. *The Hornet*, Abb. Adm., 57.

§ 1659. Under the law of Pennsylvania the death of either of the parties to a judgment, after the *fieri facias* has issued, does not prevent the *venditioni exponas* from issuing immediately upon the return of the *fieri facias* levied upon the land. A *scire facias* is not necessary. *Bleecker v. Bond*,\* 4 Wash., 6.

§ 1660. A forthcoming bond is not void for an incorrect recital of the execution, as in writing the word twenty for twelve, where the aggregate sum stated in the bond is correct according to the execution. *Williams v. Lyles*,\* 2 Cr., 9.

§ 1661. If a forthcoming bond has, by mistake, been given for a sum less than the judgment, it may, on the plaintiff's motion, be quashed, as well as the execution issued thereon, upon paying the costs of the motion. *Stevens v. Lloyd*, 1 Cr. C. C., 141.

§ 1662. It is not necessary that a forthcoming bond should recite the return of the execution, nor the certificate of the service, nor the name of the person by whom it was served; but it must state that the execution was served. *Ambler v. McMechin*, 1 Cr. C. C., 320.

§ 1663. If the plaintiff delivers his *fieri facias* to the marshal and dies, and the marshal

levies it upon the goods of the defendant, he has a right, under the law of Virginia, to give a forthcoming bond payable to the deceased creditor; and such bond will support a judgment on motion by the administrator of the creditor. *Entwisle's Adm'r v. Bussard*, 2 Cr. C. C., 331.

§ 1664. If the original judgment be reversed, the reversal of the dependent judgment on the forthcoming bond follows of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given, so as to show the connection between the two judgments. *Barton v. Petit*, 7 Cr., 288.

§ 1665. A defective forthcoming bond will, at the plaintiff's request, be quashed as well as the execution upon which it was founded. *Sutton v. Mandeville*, 1 Cr. C. C., 32.

§ 1666. The marshal may include his commissions in a forthcoming bond, and is also entitled to his commissions upon an execution on the bond. *Thomas v. Brent*, 1 Cr. C. C., 161.

§ 1667. A refusal to quash a forthcoming bond is not a judgment of the court, much less a final judgment. *Amis v. Smith*, 16 Pet., 303.

§ 1668. A bond in a chancery cause to prevent the removal of the property in litigation beyond the jurisdiction of the court, and to have the same forthcoming to abide the final order and decree, creates a personal obligation against the obligor merely, and his sureties are not bound for the acts of any other person, or acts committed after his death. *Lenox v. Notrebe*, Hemp., 225.

§ 1669. A forthcoming bond which is forfeited is a satisfaction of the judgment on which the execution issued; and no further proceeding can be founded on that judgment. The forthcoming bond is substituted for the original judgment, and the recourse of the plaintiff is against the parties to that bond. *United States v. Graves*, 2 Marsh., 379.

§ 1670. Where the law requires that a forthcoming bond shall recite the material parts of the execution on which it is taken, but gives no other direction respecting the notice of the motion to award execution on the bond than that it shall be served ten days before the motion, a notice which recites an execution against A., whereas the execution was against A. and B., is sufficient where it has caused no mistake, and it is admitted that the execution recited is the execution under which the forthcoming bond was given. *Alexander v. Brown*,\* 1 Pet., 683.

## 2. What Property Subject to Execution.

**SUMMARY**—*Franchise of a corporation*, § 1671.—*Property of a canal company*, § 1672.—*Equitable interests; equity of redemption*, § 1673.—*Chose in action*, § 1674.—*Property of a school*, §§ 1675, 1676.—*Use of intervention and third opposition in Louisiana*, § 1676.

§ 1671. The franchise or right of a canal company to take toll, being an incorporeal hereditament, cannot by the common law be seized under execution. *Gue v. Tide Water Canal Company*, §§ 1677–78.

§ 1672. Certain houses, lots, canal locks and a wharf belonging to a canal company, and necessary to the use and operation of the canal, having been seized in execution of a judgment against the said company and advertised for sale, the sale was enjoined in this case upon the ground that it would be against equity and unjust to the other creditors of the corporation, and to the stockholders, by a sale of the property levied on to destroy the value of the franchise of the company. *Ibid.*

§ 1673. By the common law and by the law of that part of the District of Columbia in which the laws of Maryland have been adopted by congress, a mere equitable interest in land, as an equity of redemption, cannot be levied on and sold under a *feri facias*. *Van Ness v. Hyatt*, §§ 1679–81.

§ 1674. An execution of *feri facias* cannot be levied on a chose in action, such as a conditional right under a contract to purchase land. *Ibid.*

§ 1675. The Louisiana State Seminary of Learning and Military Academy being a corporation under the exclusive control of officers appointed by the state, and managed in a manner pointed out by the legislature, and all of its property having been received from the state, and it being required to receive free a specified number of students to be named by the governor, it is held that its property cannot be taken on an execution on a judgment against it. *Featherrinan v. The Louisiana State Seminary*, §§ 1682–83.

§ 1676. In Louisiana the proceeding called intervention and third opposition is a proper remedy by which to restrain the taking in execution of property belonging to the state. A resort to equity is not necessary. *Ibid.*

[NOTES.—See §§ 1684–1716.]

## GUE v. TIDE WATER CANAL COMPANY.

(24 Howard, 257-264. 1860.)

APPEAL from U. S. Circuit Court, District of Maryland.

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—It appears from the record in this case that a judgment was obtained by Robert Gue, the appellant, against the Tide Water Canal Company, in the circuit court of the United States for the district of Maryland, upon which he issued a *feri facias*, and the marshal seized and advertised for sale a house and lot, sundry canal locks, a wharf and sundry other lots; all of which property, it is admitted, belonged to the Canal Company in fee. The Canal Company thereupon filed their bill in the circuit court, praying an injunction to prohibit the sale of this property under the *feri facias*. The injunction was granted, and afterwards, on final hearing, made perpetual. And from this decree the present appeal was taken.

The Tide Water canal is a public improvement situated in the state of Maryland, and constructed and owned by a joint stock company chartered by the state of Maryland for that purpose. The canal extends from Havre de Grace, in Maryland, to the Pennsylvania line; and it is admitted that the property levied on is necessary for the uses and working of the canal.

Upon the matters alleged in the bill and answer several questions of much interest and importance have been raised by the respective parties and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, because, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would be against equity and unjust to the other creditors of the corporation, and to the corporators who own the stock, to suffer the property levied on to be sold under this *fi. fa.*, and consequently the circuit court was right in granting the injunction.

The Tide Water canal is a great thoroughfare of trade, through which a large portion of the products of the vast region of country bordering on the Susquehanna river usually passes in order to reach tide-water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of assembly which created the corporation. The property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it is connected in the hands of the company, and if sold under this *feri facias* without the franchise would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

§ 1677. *A franchise is not liable to be seized and sold under a fieri facias.*

Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *feri facias*. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows it was not seized, and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the

creditor himself would, most probably, realize scarcely anything from these useless canal locks and lots adjoining them.

The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise property which was essential to its useful existence.

§ 1678. *A franchise can only be subjected to the demands of creditors through a court of equity.*

In this view of the subject, the court do not deem it proper to express any opinion as to the right of this creditor, in some other form of judicial proceeding, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt. Nor do we mean to express any opinion as to the validity or operation of the deeds of trust and acts of assembly of the state of Maryland, referred to in the proceedings. If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object; and the circuit court was right in granting the injunction, and its decree is therefore affirmed.

VAN NESS v. HYATT.

(18 Peters, 294-301. 1830.)

Opinion by MR. JUSTICE BARBOUR.

STATEMENT OF FACTS.—This is an appeal from the circuit court for the county of Washington, in a suit in equity, brought by the appellant in that court, in which a decree was made dismissing the bill with costs. The case was this: On the 31st day of December, 1818, an agreement was entered into between William Cocklin and James Shields by which Cocklin leased to Shields part of a lot in the city of Washington for ten years, from the 1st of January, 1819, for the yearly rent of \$35. The lessee was to build a two-story brick house on the lot within twelve months from the date of the lease. And it was agreed between the parties that if, at the expiration of the lease, Shields should pay to Cocklin \$375, then the rent should cease to be paid, or if all or any part of the \$375 were paid before the expiration of the lease, then such part of the rent of \$35 should cease as should bear an equal proportion to the money so paid. And on the receipt of the whole of the purchase money, and not before, Cocklin should make to Shields a good and sufficient title fee-simple to the lot described in the lease.

On the 23d of September, 1823, Shields, the lessee, mortgaged the premises to a certain John Franks to secure a debt of \$1,127.18. On the 7th of May, 1825, Franks assigned all his right and title to the appellee, who also, on the 9th of May, 1825, procured from Shields a release of his interest, and from the representatives of Cocklin a conveyance of all their title, on the 16th of April, 1826.

On the 8th of November, 1823, the appellant obtained before a magistrate

in Washington county, a judgment against Shields for \$30.25, and a *feri facias* issued thereon, on the 10th of June, 1824, which was levied by the constable upon the right, title, estate, interest and claim of Shields in the lot in question. At the sale of the lot under this execution, the appellant became the purchaser at the price of \$54, and the constable by a deed dated the 19th of August, 1825, and recorded the 9th of January, 1826, conveyed the right and title to Shields in the lot to the appellant.

The bill was brought by the appellant against the appellee Shields, the representatives of Cocklin and of Franks, stating the above facts, which are all that are material to a correct understanding of the case, charging that the mortgage to Franks was fraudulent and covinous, and that all the conveyances to the appellee were made with full knowledge to all parties of the appellant's purchase and rights; averring his readiness to pay all that Shields was bound to pay for the property in question at the time of his purchase, to Cocklin or his heirs, or to the representatives of Franks, then deceased, and praying that all the parties might be compelled to assign their pretended rights and claims to the property in question to the complainant and deliver up quiet possession of the premises, and for general relief.

The view which we have taken of the case renders it unnecessary to state the grounds of defense taken in the several answers. It will be sufficient to say that there is no proof in the cause, except the answers, as far as they are responsive to the bill, and the several exhibits with the bill and answers; that all the facts stated above are contained in the bill itself and proven by the exhibits, and that there is no evidence to sustain either fraud or notice as alleged in the bill.

Upon this state of the case the question arises whether the appellant is entitled to the relief which he prays for. The only interest which the appellant can claim in the property in question is derived from the levy made by the officer under his execution, and the purchase made by him at the sale under that execution of whatever right, title and claim Shields had in the property. Now it must be borne in mind that not only before the sale, but even before the levy, Shields had mortgaged the lot to Franks, and consequently his right was on y an equity of redemption. Was this such a right or interest as that a *feri facias* could be levied upon it? The principle of the common law undoubtedly is, that no property but that in which the debtor has a legal title is liable to be taken by this execution; and, accordingly, it is well settled in the English courts that an equitable interest is not liable to execution. 1 Ves. Jr., 431; 8 East, 467; 5 Bos. & Pull., 461.

In the United States different views have been taken on this question in the courts of the several states. It is said in 4 Kent's Commentaries, 153, 154, that courts of law have, by a gradual and almost insensible progress, adopted the views of a court of equity on the subject of mortgages, which are founded in justice and accord with the true intent and inherent nature of the transaction; that except as against the mortgagee, the mortgagor, while in possession and before foreclosure, is regarded as the real owner; and that in this country the rule has very extensively prevailed, that an equity of redemption was vendible as real property on an execution at law, and that it is also chargeable with the dower of the wife of the mortgagor, and cases are referred to in New York, Connecticut and other states in support of the proposition. On the contrary, it has been held in Virginia that the resulting interest of a grantor in a deed of trust made to secure debts cannot be reached by execution.

6 Rand., 255. And this principle is not without some strong reasons in its support, independently of mere authority. Amongst others, Lord Ellenborough very cogently remarks, in 8 East, 481, that the sheriff could only sell subject to the trusts; that the execution creditor, or the vendee, would still be obliged to go into equity to get an account, or to redeem prior incumbrances, which might be done in the first instance by a judgment creditor, with less expense and delay; besides, the destruction of the debtor's estate, which, under so much doubt and difficulty, would sell greatly under value, so that a large equitable interest might be exhausted in satisfaction of a small demand, to the detriment of other creditors.

§ 1679. *By the common law an equity of redemption is not vendible under execution.*

Whatsoever may have been the decisions upon this subject in the courts of some of the states in which the courts of law have, "by a gradual and almost insensible progress, adopted the equitable views of the subject," we must be governed, in deciding this case, by that law which congress enacted for the District of Columbia on assuming jurisdiction over it. They adopted the laws of Maryland then in force, as far as regards that part of the District in which this question arises. Amongst those laws was the common law. Now we have already seen that, by the common law, an equitable interest, such as an equity of redemption, is not liable to execution. This would be decisive of the case, unless there should be found to be some legislation or some cause of authoritative judicial decision, which had so far modified the common law by engrafting upon it the principles of the court of equity, in relation to mortgages, as to change the rule in this respect. It is not pretended that any legislative act has produced this effect. Is there any course of judicial decision which does? Three Maryland cases have been cited for this purpose. As to two of them, namely, *Purl v. Duvall*, 5 Harr. & Johns., 69, 74, and *Ford v. Philpot*, 5 Harr. & Johns., 312, it would be sufficient to say that they had been decided many years since the cession by Maryland of that part of the District in which this question arises, was made; and, therefore, whatever respect might be due to them, they are not authority. As to the case of *Campbell v. Morris*, 3 Har. & McH., 535, which was decided in the year 1797, we are informed that the chief justice of the court had declared that the covenant for quiet enjoyment in that case was a legal estate, which was attachable; and that the court gave no opinion whether an equity of redemption was liable to attachment.

But without examining these cases in detail, or undertaking to say that they would leave the question entirely free from doubt, we think that there is enough, both in the legislation and judicial decisions of Maryland, and in a decision of this court, to show how the law is understood there.

§ 1680. *A statute authorizing sale of equitable estates under execution is conclusive evidence that it was considered that such estates were not so vendible before its passage.*

As to legislation. By the act of assembly of 1810, sheriffs, under *ieri facias*, are authorized to seize and expose to sale any equitable estate or interest which the debtor may have in any lands, tenements or hereditaments. Now, why was this act passed? If such had been considered the principle at common law, the act would have been mere supererogation. It is, therefore, in our opinion, decisive evidence to prove that the contrary was considered to be the law before its passage, as it does not profess to be a declaratory act.

But let us for a moment examine the judicial decisions of Maryland, and one in this court.

In 6 Gill & Johns., 72, it is decided that a mortgagor cannot maintain trespass against a mortgagee. On the contrary, in 11 Johns., 534, it is decided that a mortgagor may maintain trespass against the mortgagee. In 4 Kent's Com., 154, it is said that an equity of redemption is chargeable with the dower of the wife of the mortgagor. On the contrary, this court, in the case of *Stelle v. Carroll*, at the last term, 12 Pet., 201, professing to follow the law of Maryland, in other words, the common law, decided that the widow of a mortgagor was not dowable of an equity of redemption. Now, why these contrary decisions upon these two important points, in relation to the nature and character of the interest and title of a mortgagor? There can be but one answer. That in New York, and other states following a similar course, the courts of law had, by a gradual progress, adopted the views of a court of equity in relation to mortgages; and considered the mortgagor, except as against the mortgagee, whilst in possession, and before foreclosure, as the real owner; and even as against the mortgagee having the right of possession; whilst in Maryland, as we learn from the case before referred to, in 6 Gill & Johnson, the legal estate is considered as being vested in the mortgagee; and that as soon as the estate in mortgage is created, the mortgagee may enter into possession, though he seldom avails himself of that right. In these antagonist doctrines we have the clue to the opposing decisions of the courts. Neither dower can be recovered, nor trespass maintained, where there is a mere equity; nor, where that is the case, can a *feri facias* be levied. The same principle, then, precisely, which in Maryland precludes the recovery of dower by the widow of a mortgagor, or the maintenance of an action of trespass by a mortgagor against a mortgagee, exempts, also, the equity of redemption of a mortgagor from being liable to execution.

But there is a case decided at the last December term of the court of appeals of Maryland, which, we think, puts an end to all question in this case. From a manuscript record of that case, which has been laid before us, we extract the following language: "The last point raised by the appellants is, that the property taken under the execution was not legally the property of Brady, and that equitable interests in personal property are not the subjects of an execution. With the appellant's premises on this point, as legal propositions, we see no reason to find fault. It cannot be denied, as a legal principle, that a debtor's equitable estate in personal property cannot, at law, be seized and sold under a *feri facias*." Now this was the case of personal estate; but it proves clearly that but for the act of 1810, before referred to, the same principle would have applied to real estate; for the difficulty does not grow out of the kind of property, but out of the kind of interest in the property, to wit, that it is equitable and not legal.

Upon these grounds we think that Shields' interest in the lot was not subject to execution on account of its being an equity of redemption. There is one ground stated in the manuscript opinion of the court of appeals of Maryland, before referred to, in relation to this subject, which it may be proper to notice.

It is there said that, as in case of equitable interest, a court of equity would, after an execution issued, and a return showing that there was no available remedy at law, assist the party by charging the equitable interest; so the court, if applied to for that purpose, would decree a ratification of a sale of such in-



terest, where it had been made by the officer under the execution. Whatever might be the authority of a court of equity on this subject as against Shields himself, it could not be done in this case; because here there are third parties who have, for a valuable consideration, without notice, acquired a previous equitable right, and gotten in, also, the legal estate. So that they stand upon the great principle that they have the prior equity, and that equity fortified by the legal title.

§ 1681. *A fi. fa. cannot be levied on a chose in action. A conditional right to purchase is a chose in action.*

But there is another view of this case, which we will present very briefly, which also brings us to the conclusion that Shields' interest in the lot in question would not have been liable to execution, even if it had not been incumbered by a previous mortgage. And it is this: beyond the mere lease for years, Shields had no interest whatsoever in the lot, but the right to purchase, in case he, by a given time, complied with the particular conditions. Now this right to purchase we consider nothing more than a contract by which the party was entitled, if he had elected to have done so, upon certain terms, to secure to himself certain benefits. In other words, at the time of the levy of the appellant's executions, Shields had a conditional right to purchase, which in effect was nothing more than a *chose in action*. We do not think it necessary to refer to authorities to sustain a proposition so well settled as that an execution of *fi. fa.* cannot be levied on a *chose in action*.

But even if this could be done, no one could derive a greater benefit under that contract than the party himself; and Shields could not have claimed the benefit of the election given to him to purchase, because it depended, in its very terms, on particular conditions to be performed by him, at a particular time; which were not performed. Upon these grounds we think that Shields had not such an interest in the lot in question as was liable to execution; that consequently, the appellant acquired no right by his purchase which gives him a stand in a court of equity to ask for the right of redemption, or any other relief. The decree of the circuit court is therefore right, and is affirmed, with costs.

#### FEATHERMAN v. LOUISIANA STATE SEMINARY.

(Circuit Court for Louisiana: 2 Woods, 71-73. 1874.)

Opinion by Woods, J.

STATEMENT OF FACTS.—A *fi. fa.* was issued upon a judgment recovered in this court by Featherman against the Louisiana State Seminary of Learning and Military Academy. It was levied on six thousand five hundred volumes of books and other personal property, as the property of the defendant in execution, and the marshal was proceeding to advertise and sell the same when the state filed her intervention and third opposition, claiming that the property levied on was the property of the state, and praying that the marshal be restrained from proceeding further with the sale under the execution. The marshal was restrained by the order of a judge of this court, and the plaintiff in execution now moves the court to dissolve the order.

§ 1682. *The property of a public corporation cannot be taken in execution, although by its charter it can sue and be sued.*

The State Seminary is a public and not a private corporation. It is, by an act of the legislature, placed under the superintendence of a board of visitors,

one of whom is the governor, and another the superintendent of education, and twelve others to be appointed by the governor. The fund which constitutes its only endowment is the proceeds of land donated by congress. The state has made frequent donations for its support. In 1867 the legislature appropriated out of the general fund \$5,000 to enlarge the library. It appropriated \$31,000 in 1869 out of the general fund for the general use of the seminary, \$5,000 of which was appropriated for the purchase of apparatus and books. In 1870 \$20,000 were appropriated to the seminary to supply losses occasioned by the fire which destroyed the buildings of the institution, and in 1871 another appropriation was made of \$10,000 for the purchase of books.

The institution has not only been under the exclusive control of officers appointed by the state, and managed in the manner specifically pointed out by the legislature, but all its property, except a few insignificant donations of books, has been received either from the state directly, or has been granted to the state by congress for educational purposes, and it has been required to receive free a specified number of students to be named by the governor. It is therefore clearly one of that class of "public corporations which are founded for the public, though not for political or municipal purposes, and the whole interest in which belongs to the government." Ang. & Am. on Corp., sec. 14.

Can the property of such an institution be seized on execution? It seems to me that the marshal would have the same right to levy upon the furniture and other property of the state, used in the institution for the deaf, dumb and blind. The only difference between the cases is that the overseers of the State Seminary are made a body corporate, with power to sue and be sued, while the board of administrators in the deaf, dumb and blind institution is not.

But this fact does not any the less make the corporation a public corporation, nor its property any the less the property of the state. I am therefore of opinion that the order forbidding the marshal to proceed with the execution ought not to be revoked.

§ 1683. *In Louisiana intervention and third opposition takes the place of replevin at common law.*

It has been objected that the state has mistaken its remedy, which should have been by regular bill in equity. I do not think the objection well taken. The property levied on is personal property. At common law the remedy would be replevin, but the jurisprudence of Louisiana has substituted for this common law action a proceeding called an intervention and third opposition. There is no necessity, therefore, for resorting to equity. It is not a case for the interference of a court of equity. There is a remedy at law, and the practice of this state points out what it is. It has been followed in this case, and we are required by the practice act of 1872 to sustain it. *The Bank v. Labitut*, 1 Woods, 11.

§ 1684. **Partnership interests.**—A judgment against one of the partners of a firm will authorize the sheriff or marshal to levy on the right of the judgment debtor in the goods. *United States v. Williams*, 4 McL., 236.

§ 1685. Where lands are held by several in partnership, the interest of each partner is liable on execution in the same manner as partnership personal property. The purchaser at the execution sale acquires no title to the land, but only the interest which the partner had, and he has no greater interest or different rights or privileges than the execution debtor had. *Clagett v. Kilbourne*, 1 Black, 846.

§ 1686. A sale on execution of the interest of a partner in partnership assets conveys only the interest of such partner in the assets after the firm creditors are paid, and the fact that the interest of several partners has been acquired by the same person on executions against them

can give such purchaser no additional rights as against firm creditors. *Osborn v. McBride*,\* 16 N. B. R., 22.

§ 1687. A court of equity will enjoin the levy of an execution against one partner on property of the firm in which it is admitted he has no interest which can pass by a sale. *Cropper v. Coburn*, 2 Curt., 465.

§ 1688. Land.—There is no act of congress expressly making lands liable to execution, and if liable to execution from the courts of the United States it must grow out of the operation of the process acts of 1789 and 1792. *Koning v. Bavard*, 2 Paine, 251 (§§ 915-22).

§ 1689. Alien purchaser of registered vessel.—A *bona fide* purchaser of the whole interest in a vessel, subsequent to a forfeiture incurred under the sixteenth section of the act of congress of December 31, 1792 (1 U. S. Stat. at Large, 295), by the sale or transfer to an alien of any interest in an American registered vessel, is not within the proviso of that section; and the title of the alien purchaser, if he acquires any, is divested *eo instanti* by the statute, and he has left in him no interest which can be seized on execution. *The Florenzo*, Bl. & How., 52.

§ 1690. Equitable rights.—An equity is not subject to execution unless by statute. *Lenox v. Notrebé, Hemp*, 251.

§ 1691. By the law of Kentucky, no equitable interest in real or personal property, unless it is held by mortgage, deed of trust, or other incumbrance, can be taken in execution. *Bank of United States v. Tyler*, 4 Pet., 366.

§ 1692. According to the common law, no equitable interest in property of any kind can be sold on execution. *Morsell v. First National Bank*,\* 1 Otto, 357.

§ 1693. A mere equitable interest in lands is not subject to execution at law. This is the common law, and the law of Maryland under the statute of 1715, chapter 40. It is also the construction of the British statute of 5 Geo. 2, ch. 7, making lands in the plantations and colonies liable for debts. *Sawyer v. Morte*,\* 3 Cr. C. C., 381.

§ 1694. The law of Maryland of 1810, allowing an equitable title to be sold on *fi. fa.*, does not change such equitable title to a legal one in the hands of the purchaser so that he can maintain ejectment upon it. *Smith v. McCann*, 24 How., 898.

§ 1695. Land held without certificate or patent.—One who has entered land of the government at the proper office and paid for it in his own name, and has the right to a certificate of purchase from the general land office, has such an "equitable right" as is subject to execution for the satisfaction of judgments by the law of Iowa, although no patent has issued from the government. *Levi v. Thompson*,\* 4 How., 17.

§ 1696. An equity of redemption, at common law, cannot be sold on execution. *Hill v. Smith*, 2 McL., 446; *Piatt v. Oliver*, 2 McL., 267.

§ 1697. Prior to 1848 it was the law of Indiana that an equity of redemption of a mortgagor could not be sold on execution. In that year a statute was passed providing that the equity of redemption should not be sold by virtue of an execution on a judgment recovered by the mortgagee. But this law not having been adopted by the United States circuit court for Indiana, that court followed the prior law as it stood when the act of 1828 was passed adopting the process acts of the respective states. *Campbell v. McMann*,\* 5 McL., 107.

§ 1698. The equity of redemption of a mortgagor of land in that part of the District of Columbia ceded by the state of Maryland to the United States cannot be taken in execution under a *fi. fa.* At the time of the cession to the United States, the rule of the common law was the law of Maryland. *Van Ness v. Hyatt*, 13 Pet., 294.

§ 1699. The equity of redemption of a leasehold estate cannot be seized and sold under *fi. fa.* *Van Ness v. Hyatt*, 5 Cr. C. C., 127.

§ 1700. The naked legal title of land, without a beneficial interest therein, cannot be sold on a *fi. fa.* *Smith v. McCann*, 24 How., 398.

§ 1701. A judgment of a justice of the peace cannot be seized and sold under a *fi. fa.* issued by a justice of the peace. *Bowen v. Howard*, 5 Cr. C. C., 308.

§ 1702. On judgment against executors.—In Indiana a judgment against executors does not authorize an execution against the lands of the deceased, and a sale of lands on such execution can confer no title. *O'Brien v. Woody*, 4 McL., 75.

§ 1703. Property and revenue of municipal corporations.—Lands held by a city for public purposes, and ground rents arising from such lands and constituting a part of the public revenue, are not liable to sale on execution on a judgment against the city. *Klein v. New Orleans*, 9 Otto, 149.

§ 1704. The public revenues and taxes of a municipal corporation cannot be seized by creditors on execution; nor are they subject to garnishment when deposited in a bank. *Peterkin v. City of New Orleans*, 2 Woods, 100.

§ 1705. The four square leagues of land belonging to the city of San Francisco as the successor of the Mexican pueblo on the same site was not subject to execution on a judgment against the city. *United States v. Hare*, 4 Saw., 658.

§ 1706. Land held under a special warrant may be levied upon under a *fi. fa.*, and sold under a *venuditioni exponas*; but land held under an indescriptive warrant cannot be so levied upon. *Lessee of Lewis v. Meredith*, 3 Wash., 81.

§ 1707. Debts.—By the laws of Louisiana, debts which are due to a defendant against whom an execution has issued may be seized and sold. But they must first be appraised at their cash value, and if two-thirds of such appraised value is not bid, the sheriff must adjourn the sale and again advertise the property. *Collier v. Stanbrough*, 6 How., 14.

§ 1708. Money.—Money may be taken in execution under a *fi.eri facias*. *Turner v. Fendall*,\* 1 Cr., 116.

§ 1709. — in hands of officer.—An execution creditor has not such a legal property in specific pieces of money levied for him and in the hands of the sheriff as to authorize that officer to take those pieces in execution as the goods and chattels of such creditor upon an execution of a third person against him. It is the duty of the officer to bring the money into court. *Ibid*.

§ 1710. A sheriff or marshal cannot levy an execution against A. upon moneys in his own hands which he has made upon an execution in favor of A.; and a return showing such a levy is not good. *Fendall v. Turner*,\* 1 Cr. C. C., 35; *Reno v. Wilson*,\* Hemp., 91.

§ 1711. Property in hands of receiver.—Where property in possession of the court by its receiver is by final order decreed to belong to one of the parties to the suit, it is his for all purposes and may be levied upon as his property, although it still remains in the hands of the receiver subject to his demand. *Very v. Watkins*,\* 23 How., 469.

§ 1712. Copyrights—Engraving plates.—A copyright is not the subject of seizure and sale by execution. *Stephens v. Cody*, 14 How., 528.

§ 1713. Where the copyright of a map was taken out under the act of congress, and the copper-plate engraving seized and sold under an execution, the purchaser did not acquire the right to strike off and sell copies of the map. *Stephens v. Cody*, 14 How., 528; *Stevens v. Gladding*, 17 How., 447.

§ 1714. Miscellaneous.—The liability of property to be sold under legal process issuing from the courts of the state where it is situated is to be determined by the law there, rather than by that of the jurisdiction where the owner lives. *Hervey v. Rhode Island Locomotive Works*, 3 Otto, 684.

§ 1715. A judgment creditor differs from a *bona fide* purchaser, for a valuable consideration without notice, in that the former is entitled to take, on execution, only what belonged to his creditor, while the title of the latter does not depend on that of the seller. *Everett v. Stone*, 3 Story, 446.

§ 1716. Goods, though chiefly household furniture, suffered to remain in possession of the defendant for more than a year after a levy, are liable to a subsequent execution. *United States v. Conyngham*, 4 Dal., 358.

### 3. Exemptions.

[In Bankruptcy, see DEBTOR AND CREDITOR.]

#### SUMMARY—Judgments in favor of United States, § 1717.

§ 1717. State exemption laws cannot apply to judgments rendered in favor of the United States. *United States v. Howell*, § 1718.

[NOTES.—See §§ 1719-1729.]

#### UNITED STATES v. HOWELL.

(Circuit Court for North Carolina: 4 Hughes, 483-487. 1881.)

Opinion by DICK, J.

STATEMENT OF FACTS.—The constitution of this state, in article 10, sections 1, 2, provides as follows:

“The personal property of any resident of this state, to the value of \$500, to be selected by such resident, shall be, and is hereby, exempted from sale under execution or other final process of any court, issued for the collection of any debt.”

“Every homestead, and the dwelling and buildings used therewith, not exceeding in value \$1,000, to be selected by the owner thereof, or in lieu

thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of \$1,000, shall be exempt from sale under execution, or any other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises."

Various laws have been enacted by the state legislature for the purpose of securing and carrying out these constitutional provisions. It has been decided by the supreme court of the United States, in *Edwards v. Kearzey*, 96 U. S., 595 (Const., §§ 1664–71), and subsequently by our state supreme court in *Earle v. Hardie*, 80 N. C., 177, that the second section of article 10 of the state constitution of 1868, which exempts from execution real property of a resident debtor, not exceeding in value the sum of \$1,000, is void against pre-existing debts, being in contravention of the constitution of the United States, which inhibits a state from passing a law impairing the obligation of contracts.

In *Lamb v. Chamness*, 84 N. C., 379, it is decided that the homestead of a defendant bankrupt is protected from sale under execution by operation of the amendment to the bankrupt act of 1873, without regard to the date of the judgment lien. After many elaborate arguments and decisions in the courts, and with the aid of frequent legislative enactments, the rights of homestead and personal property exemptions provided for in the state constitution are well defined and established as to debts due to individual creditors.

Every resident debtor is secured in these rights against sale under execution founded on a judgment obtained in any state or federal court on any debts contracted since the adoption of the state constitution, except for taxes and the purchase money of land claimed as a homestead. I am inclined to think that this constitutional provision was intended to apply only to debts arising in the relation of individual debtor and creditor, and did not contemplate debts due to the state or the United States.

I am not aware of any decision of the state supreme court upon this subject, and I will not express a decided opinion as to how far these constitutional exemptions apply to debts due to the state. I fully recognize the doctrine that the federal courts are bound to accept as correct the decisions of the state courts upon all questions arising under the state constitution and laws, when no question of national rights and authority is involved.

In the course of my argument I feel that I can with propriety express the inclination of my opinion, as, from observation and experience, I am familiar with the history of the situation, condition and feelings of the people of the state, and the purposes they had in view at the time they formed and adopted the state constitution of 1868. They had just emerged from a disastrous civil war, which had resulted in the loss of most of their property, and they were greatly embarrassed by indebtedness to individual creditors, and they desired to secure their homestead and household effects, which were to them necessities of life, from the ruinous consequences of sale under execution. Previous to the adoption of the constitution various statutes had been passed by the legislature of the state to stay proceedings in the courts, and to postpone sales of property under executions upon judgments which had been or might be obtained.

In interpreting and construing this article of the constitution I think that I can make the reasonable inference that the intent of the people, in the exercise of their rights of sovereignty in framing their organic laws, was perma-

nently to secure their homes and the necessities of life against the eager grasp of individual creditors. This intent is made still more manifest by the uniform course of subsequent legislation upon this subject, as legislative action is generally an index of popular feeling and sentiment. There is a striking analogy and generally an entire harmony between the rules of interpretation of constitutions and those of statutes. The first and fundamental rule in relation to the interpretation of all instruments applies to a constitution; that is, to construe them according to the sense of the terms and the intention of the parties. Potter's Dwarrris, 655.

§ 1718. *The exemption laws of a state do not apply to debts due to the United States. Rule for the construction of statutes.*

In considering the language of the constitution, the condition of the country at the time when adopted, and the various circumstances which clearly indicate public sentiment, I am strongly inclined to the opinion that the exemption provisions do not, and were not intended to, apply to debts due the state or the United States. But, independent of these rules of interpretation and construction which related to the *intent* of the framers of the constitution, there is an old and well-established rule of law that governs this question. When general words are used in a statute they do not include the government, or affect its rights, unless such intention is made clear and indisputable by express words in the statute. This doctrine is fully announced and acted upon by the supreme court, in considering the rights of the United States under the bankrupt act, in the case of *United States v. Herron*, 20 Wall., 251 (DE. AND CR., §§ 2040-47).

There are other well-settled principles of law, which, I think, are conclusive upon this subject. The state constitution extends to all the subjects of government within its territorial limits, except those which have been ceded to the supreme and exclusive control of the national government. "The sovereignty of the United States and of the several states are distinct and independent of each other within their respective spheres of action, though both exist within the same territorial limits." The national government, though limited as to its objects, is supreme as to those objects, and any state law in conflict with the rights and powers of the national government is inoperative to the extent of such interference. The national government, in the exercise of its legitimate powers, has devised and adopted a system of internal revenue, and no state convention or legislature can impede and obstruct the free course and accomplishment of those measures, as they are essential to the important objects for which the national government was established. *Bank of Commerce v. New York City*, 2 Black, 620 (Const., §§ 408-13).

The principles of law upon this subject are well settled, and need no further statement or discussion. I think I may state as correct the general proposition that state exemption laws cannot apply to any debt, obligation, duty or liability due from a citizen to the United States. Exemption laws are generally prompted by a spirit of generosity and humanity, and when confined to reasonable limits I regard them as establishing a wise and beneficent public policy in securing to unfortunate debtors and their families the necessities of life, and thus in some degree enabling them to follow the pursuits of industry which are necessary to the existence and well-being of every community. Most of the states have adopted this wise and humane policy, which is in accordance with the liberal and enlightened spirit of the age.

In section 3187 of the Revised Statutes, provision is made for exempting

certain property from distraint for internal revenue taxes, and I think that these exemptions might well be extended to all the debts due the United States upon collections made under execution; but this is a matter for the consideration and action of congress, and not for judicial liberality, as the courts must construe and enforce the law as it is written.

The district attorney may draw the order requested in his motion.

§ 1719. In federal courts.—Congress has authority to provide for exemptions of property as against executions issued from federal courts, but in the absence of legislation on that subject the state exemption laws govern. *Salentine v. Fink*, 8 Biss., 503.

§ 1720. A suit on a bond given for the release of property seized for violation of the internal revenue laws is a civil suit, and the exemption laws of Wisconsin protect the homestead of the judgment debtor against seizure under execution on such a judgment. *Ibid.*

§ 1721. Tools, etc.—The business of a contractor is not a "trade, occupation or profession," within the meaning of the law exempting certain tools, implements, etc., from execution. Thus, although a carpenter's tools were exempt, his horse and buggy, which he used in his business as contractor, were not. *In re Whetmore*, Deady, 586.

§ 1722. The provision of the statute of Wisconsin, exempting "the tools and implements or stock in trade of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business, not exceeding \$200 in value," applies to merchants. *In re Bjornstad*, 9 Biss., 13.

§ 1723. Team and wagon.—Under section 14 of the bankrupt act, and section 279, subdivision 8, of the Oregon Civil Code, a bankrupt's team and wagon are not exempt from the operation of the act, unless he habitually earns his living by some trade, occupation or profession, the carrying on of which requires the use of such team and wagon. The exemption law is made for the benefit of those who live by their labor, and does not apply to men whose business it is to direct the labor of others. The pursuit must be one involving the personal labor and skill of the debtor, and the article claimed as exempt must be something which is necessary to enable him to carry it on. *In re Parker*, 5 Saw., 58.

§ 1724. Property in hands of receiver.—An act of the legislature exempting certain property from execution will not be extended to property in the hands of a receiver appointed in a chancery suit before the passage of the act. *Lawrence v. Wickware*,\* 4 McL., 56.

§ 1725. Partnership.—In the absence of fraudulent intent a partnership may dissolve, and one partner may take all the property and assume all the debts, and may retain an exemption as against firm creditors out of the property transferred to him from the firm. *In re Bjornstad*, 9 Biss., 13.

§ 1726. Property of municipal corporation.—There are two classes of property of a municipal corporation that are exempt from seizure on execution: 1st, taxes, court-houses, jails, markets, and property of such a nature as to be necessary to the continued exercise of the functions of the corporation; 2d, property that has been destined and set apart by an act of the legislature as a permanent revenue of the corporation, or a source of permanent revenue. *City of New Orleans v. Morris*, 3 Woods, 103.

§ 1727. A market where fish, meat, vegetables, etc., are daily furnished for the sustenance of the population of a city is exempt from execution; but a "market bazaar" for the sale of other articles, and from which traffic in comestibles is excluded, is not exempt. *Ibid.*

§ 1728. A city cannot by its own act, independent of any legislative authority, make a thing which is not necessary to its municipal existence, nor to the exercise of the powers which fairly belong to the municipal corporation, a permanent source of revenue, and thereby exempt the revenue and the thing from seizure under execution. *Ibid.*

§ 1729. The act of Louisiana exempting the property of the city of New Orleans from execution is inoperative as to contracts entered into before the passage of the act. *Ibid.*

#### 4. Conflict of Jurisdiction.

SUMMARY—Property levied on by state officer and delivered to a third party, §§ 1730, 1731.

§ 1730. An execution issued out of a federal court cannot be levied upon property already levied upon by an execution from a state court. *Hagan v. Lucas*, §§ 1732-35.

§ 1731. Property taken in execution is not withdrawn from the custody of the law when it is delivered to a third person claiming it, upon his giving the required bond, and property so situated cannot be levied upon under an execution issued from a court of a different jurisdiction. *Ibid.*

[NOTES.—See §§ 1736-1738.]

## HAGAN v. LUCAS.

(10 Peters, 400-406. 1835.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is a writ of error prosecuted by the plaintiff to reverse a judgment of the district court, vested with the powers of a circuit court, for the southern district of Alabama. The record in the district court states that on the 14th of December, 1833, a judgment was entered in that court in favor of John Hagan, against William D. Bynum and Alexander M'Dade for the sum of \$2,972.58, besides costs; and that an execution was issued against the goods and chattels, lands and tenements of the defendants, which, on the 19th of February, 1834, was levied on several slaves that were claimed by Charles F. Lucas; who gave bond to try the right of property. At the time of the levy the slaves were in the possession of the claimant.

And the question as to the right of property being brought before the court, under a statute of the state, the claimant, Lucas, as stated in the bill of exceptions, gave in evidence three records, certified by the clerk of the circuit court of Montgomery county, Alabama, of three judgments rendered in that court, at September term, for various amounts against the above defendants, Bynum and M'Dade; and upon which judgments it was proved executions had regularly issued to the sheriff of Montgomery county, which, on the 10th of October, 1833, were levied on the same slaves taken in execution by the marshal, as above stated; and that the claimant filed his affidavit on the 25th of November, 1833, in the mode prescribed by the statute; setting forth that the slaves were not the property of the defendants in the execution, but were his property, and gave bond and security to the sheriff, as required by the statute, for the forthcoming of said property, if it should be found subject to said executions; and for all costs and charges for the delay, etc.

On the giving of this bond the slaves were delivered to the possession of the claimant; and these proceedings were returned by the sheriff to the circuit court of Montgomery county. And the records showed that at the March and November terms in 1834, the proceedings for the trial of the right of property were continued. The record was certified on the 4th of December, 1834.

Upon this evidence the court instructed the jury that if they believed that, previously to the levy of the marshal, the slaves had been levied on by the sheriff of Montgomery county, and that they had been delivered to Lucas, on his making oath and giving bond, as required by the statute; and if they believed that the proceedings on said claim were still pending and undetermined in the circuit court, that the property was, in the opinion of the court, considered as in the custody of the law, and consequently not subject to be levied on by the marshal.

And the counsel for the defendant objected to the records from the circuit court of Montgomery, as showing the pendency of the suit in that court, respecting the right of property, as a term of the court had intervened between the certification of the record and the time of using it in evidence. But the court overruled the objection, saying the pendency of the suit was a matter of fact for the jury to determine; and that they might infer from the proof before them that the suit was still pending, which presumption might be rebutted by the plaintiff in the execution, etc.

The statute of Alabama, under which this proceeding took place, was passed on the 24th of December, 1812, and provides that where any sheriff shall levy



execution on property, claimed by any person not a party to such execution, such person may make oath to such property, on which the sale shall be postponed by the sheriff until the next term of the court; and the court is required to make up an issue to try the right of property, etc., and the claimant is required to give bond, conditioned to pay the plaintiff all damages which the jury, on the trial of the right of property, may assess against him, etc.; and it is made the duty of the sheriff to return the property levied upon to the person out of whose possession it was taken, upon such person entering into bond, with security, to the plaintiff in execution, in double the amount of the debt and costs, conditioned for the delivery of the property to the sheriff whenever the claim of the property so taken shall be determined by the court; and on failure to deliver the property, the bond, on being returned into the clerk's office, is to have the effect of a judgment.

§ 1732. *A levy withdraws the property seized from the reach of process from other jurisdictions.*

The principal question in this case is, whether the slaves referred to were liable to be taken in execution by the marshal, under the circumstances of the case. Had the property remained in the possession of the sheriff, under the first levy, it is clear the marshal could not have taken it in execution, for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other.

Under the state jurisdiction a sheriff having execution in his hands may levy on the same goods; and where there is no priority on the sale of the goods the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern where the executions, as in this case, issue from different jurisdictions. The marshal may apply moneys collected under several executions the same as the sheriff. But this cannot be done as between the marshal and the sheriff.

A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other.

§ 1733. *A marshal or sheriff acquires a special property in goods levied upon.*

The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time, by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer; and especially by an officer acting under a different jurisdiction.

§ 1734. *Where an officer delivers property to a claimant upon his giving bond that he will return it if found subject to the execution, it cannot be seized under another execution in the hands of different officers.*

But it is insisted, in this case, that the bond is substituted for the property; and, consequently, that the property is released from the levy. The law provides that the property shall be delivered into the possession of the claimant,

on his giving bond and security in double the amount of the debt and costs, that he will return it to the sheriff if it shall be found subject to the execution. Is there no lien on property thus situated, either under the execution or the bond?

That this bond is not in the nature of a bond given to prosecute a writ of error, or on an appeal, is clear. The condition is that the property shall be returned to the sheriff, if the right shall be adjudged against the claimant. Now it would seem that this bond cannot be considered as a substitute for the property, as the condition requires its return to the sheriff. The object of the legislature in requiring this bond was to insure the safe-keeping and faithful return of the property to the sheriff, should its return be required. If, then, the property is required by the statute and the condition of the bond to be delivered to the sheriff on the contingency stated, can it be liable to be taken and sold on execution?

If the property be liable to execution, a levy must always produce a forfeiture of the condition of the bond. For a levy takes the property out of the possession of the claimant, and renders the performance of his bond impossible. Can a result so repugnant to equity and propriety as this be sanctioned? Is the law so inconsistent as to authorize the means by which the discharge of a legal obligation is defeated and at the same time exact a penalty for the failure? This would, indeed, be a reproach to the law and to justice. The maxim of the law is that it injures no man and can never produce injustice.

On the giving of the bond, the property is placed in the possession of the claimant. His custody is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes as it would have been in the hands of the sheriff.

In Holt, 643, and 1 Show., 174, it was resolved by Holt, chief justice, that goods, being once seized and in custody of the law, they could not be seized again by the same or any other sheriff; nor can the sheriff take goods which have been distrained, pawned or gaged for debt (4 Bac. Ab., 389); nor goods before seized on execution, unless the first execution was fraudulent, or the goods were not legally seized under it.

In Woodfall's Tenant's Law, 389, it is said: By the seizure under the execution, the goods were in the custody of the law, and were not, therefore, distrainable; for it is repugnant, *ex vi termini*, that it should be lawful to take the goods out of the custody of the law; and that cannot be a pledge which cannot be reduced into actual possession. In 3 Mun., 417, the court decided that the lien, by virtue of a writ of *fiery facias*, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited.

In that case, the defendant's property having been levied on by an execution in the hands of the sheriff, was suffered to remain in his possession on his giving a forthcoming bond for the delivery of the goods on the day of sale; but before the day of sale the defendant delivered the goods in satisfaction of another execution, and the question was made whether the forthcoming bond released the lien of the first execution.

In his opinion, Judge Roane draws the following distinctions between a forthcoming bond and what is called a replevy bond, under the statute of

Virginia: 1. A replevy bond under the act operated a release of the property. 2. Because the surety therein is to be approved by the creditor; a circumstance very material in a bond considered as a substitute for an execution, and wanting as to the sureties upon forthcoming bonds. 3. Because a replevy bond obtained the force of a judgment by the mere giving thereof, though its execution was suspended till the expiration of the three months, and did not owe its obligation, as a judgment, to the breach of the condition thereof, as is the case of forthcoming bonds.

The bond given by the claimant, Lucas, bears a strong analogy to the forthcoming bond. By the latter, the goods were to be delivered to the sheriff on the day of sale; by the former, the goods were to be delivered to the sheriff so soon as the right shall be determined against the claimant. In neither bond is the plaintiff in the execution consulted, as is done in a replevy bond, as to the sufficiency of the surety; nor do either of these bonds, like the replevy bond, operate as a judgment, until a breach of the condition. In fact the bond under the Alabama statute is substantially a forthcoming bond.

In a late case the supreme court of Alabama decided the same question which is made on this bond, on a bond given for the delivery of property under the attachment laws of that state. They decided that the giving of the bond did not release the goods from the lien of the attachment. A contrary decision had been given by the court in a case similar; but on further examination and more mature reflection, two of the three judges made the above decision.

§ 1735. *In construing state statutes decisions of state courts are followed.*

This adjudication being made on the construction of a statutory proceeding, and by the supreme court of the state, forms a rule for the decision of this court. We think that part of the charge to the jury by the district court which respected the pendency of the suit in the state court, and which was excepted to, was substantially correct; and we are of opinion that on principle and authority, and also under the construction given to the statute by the supreme court of the state, the judgment of the district court must be affirmed.

§ 1736. *In general.*—Property within the custody of a state court will not be interfered with by the process of a federal court. *Fox v. Hempfield R. R. Co.*, 8 Phil. (Pa.), 639; S. C., 18 Int. Rev. Rec., 23; S. C., 2 Abb., 151.

§ 1737. A court of the United States will, upon motion, allow money brought into its custody upon an execution to be taken out to satisfy a prior execution of a state court having a lawful preference, in the same manner as if the judgment of the state court were a judgment of its own. But it will take care that the execution and the proceedings under it are regular. *Azcarati v. Fitzsimmons*,\* 8 Wash., 134.

§ 1738. Property in the hands of officers of a state court cannot be levied upon by process from the federal courts. *Fox v. Hempfield R. R. Co.*, 2 Abb., 151; S. C., 18 Int. Rev. Rec., 23; S. C., 8 Phil. (Pa.), 639.

### 5. *Levy and Return.*

[See *Warra*.]

§ 1739. *Abandonment of levy.*—Where an execution was issued pending a motion for a new trial, and levied on property, and, at the suggestion of the court, the execution was returned without any further proceedings upon it, and the marshal withdrew the watchman from the property, it was held that the levy was not abandoned. *Dawson v. Daniel*,\* 2 Flap., 305.

§ 1740. The question of the abandonment of a levy is to be tested not so much by what the marshal did as what he was required to do. *Dawson v. Daniel*,\* 2 Flap., 310.

§ 1741. Appointment of keeper.—After a levy has been made of a *fi. facias* upon goods and chattels, the officer may confide them to another person for safe keeping until there has been a settlement of the judgment and payment of all costs. Thus, if the property is already in the possession of the court by its receiver, the officer may make the levy and permit the property to remain in the possession of the receiver. *Very v. Watkins*,\* 28 How., 469.

§ 1742. One who purchases lands which are bound by a judgment against the seller may move to quash the return of a *fi. facias* levied thereon, or may have an *audita querela*. *Jackson v. Bank of United States*,\* 5 Cr. C. C., 1.

§ 1743. Question of ownership.—The fact that a judgment creditor levies execution on certain property as belonging to the debtor, considered, in a doubtful case where the claim of a different ownership was set up by the creditor, as an admission by him that the property in question was the property of the debtor. *Hurst v. Teft*, 12 Blatch., 217.

§ 1744. Amendment.—A defective levy should not be amended to the disadvantage of a second perfect levy. *Gault v. Woodbridge*,\* 4 McL., 329.

§ 1745. The courts, in allowing amendments on the returns of officers on levies of real estate, confine themselves to cases where the question is mainly between the original parties, and the rights of third persons have not intervened. *Kent v. Roberts*,\* 2 Story, 591.

1746. Second levy.—When the levy of an execution is set aside because it does not sufficiently describe the land levied upon, a second levy is made good. *Gault v. Woodbridge*,\* 4 McL., 329.

§ 1747. Validity of sale.—A sale under a *fi. fa.*, duly issued, is legal as respects the purchaser, provided the writ be levied upon the property before the return day, although the sale be made after the return day, and the writ never be actually returned. *Wheaton v. Sexton's Lessee*, 4 Wheat., 508.

§ 1748. In the absence of statute, after a levy by judgment creditor, the writ may be returned on the return day and the levy enforced by a *renditioni exponas*; and under the statutes of Missouri (Gen. Stats. 1865, p. 646), the power to sell exists after the return day, for the express provision is that if there is a levy when the writ is in force, and the sale is not made at the next term, the execution and lien created thereby shall remain and continue in force until the end of the second term, and until a term of court is held at which the real estate may be sold according to law. *Webster v. Woolbridge*, 3 Dill., 74.

§ 1749. Insolvency—Sufficiency of return—Limitations.—A sheriff's return upon an execution as follows: "Received this writ April . . . , and on examination I find that the lands within described have all been sold under a proceeding in favor of B. in the court of common pleas against the defendants and others; and as to the command for further levy, I have made search and can find no property of the defendants or either of them in my bailiwick whereon to levy," establishes the insolvency of an execution debtor so as to give a right of action against the surety in an appeal bond under the Ohio statute of 1831. And although the judgment on which the execution was levied was dormant, such execution is voidable and not void. Hence the proceedings of the sheriff under it cannot be collaterally impeached, and the statute of limitations begins to run immediately upon the return of the execution. *Goshorn v. Alexander*, 2 Bond, 158.

§ 1750. Death of defendant.—Where a levy has been made, the sheriff may go on and sell, though the decease of the defendant occur subsequently to the levy. If the defendant die before the levy, the judgment must be revived. *Sumner v. Moore*, 2 McL., 59.

§ 1751. No search.—The return of the executions on the judgment, *nulla bona*, is sufficient without stating that search was made for property by the officer. *Suydam v. Reals*, 4 McL., 12.

§ 1752. After return day.—An execution, after the expiration of the time within which it was made returnable, is of no force, and an arrest under it is a trespass. *Stoyel v. Lawrence*,\* 8 Day (Conn.), 1.

§ 1753. To make a levy effectual, the property seized should be specially designated in the return of the execution, or by reference to a schedule accompanying it. *Barnes v. Billington*, 1 Wash., 29.

§ 1754. Trespassers.—One who has given a sheriff a bond to indemnify him in making a levy is liable as a principal with the sheriff, if he commit a trespass in making the levy. *Parrish v. Danford*, 1 Bond, 345.

§ 1755. The plaintiff has a right to enter the defendant's house with the constable, who has a *fi. fa.*, to show the defendant's property upon which to levy the execution. *Harrington v. Duel*, 3 Cr. C. C., 355.

§ 1756. Right of officer to recapture property.—If a levy by a sheriff is valid, and the property levied on is wrongfully removed from the place where the sheriff left it, he has a right to reclaim it and take possession of it wherever he can find it, if he uses no more force in doing so than was absolutely necessary. If he is justified in retaking it, all who assisted him in doing so are justified. *Parrish v. Danford*, 1 Bond, 345.

§ 1757. **Impeaching return.**—It cannot be objected to the return upon an execution that it is the act of an officer whose conduct in making it is impeached. The return must stand until falsified, and one who introduces such return in support of a motion to quash it must take it in its entirety. *Buckhannan v. Tinnin*,\* 2 How., 258.

§ 1758. The return of an officer is presumed to be correct, and the burden of showing that it is not so rests upon the execution debtor. Such presumption is not rebutted by the fact that it is returned on the day it is issued. *Bassett v. Orr*, 7 Biss., 296.

§ 1759. An execution creditor is not so far bound by a return *nulla bona* that he cannot be permitted to show that there was personal property belonging to the execution debtor, which might have been seized by the officer during the life of the writ. *In re Tills*,\* 11 N. B. R., 214.

§ 1760. **Priority—Sufficiency of levy.**—If an execution is delivered to an officer with orders not to levy it at all, or until further orders, the purpose of the delivery is not answered, and all the legal consequences of the measure, in respect to creditors, are defeated. If the officer is ordered to levy, but to leave the property with the owner until he shall be otherwise directed, it is no levy in respect to third persons. Thus, an execution was delivered to a sheriff with instructions not to levy it until further orders, which orders were subsequently given and a levy made in pursuance of them, but the property was left in possession of the defendant by direction of the plaintiff; the following day two executions were issued from the federal court, on judgments subsequently recovered against the same defendant, and the marshal seized and removed the property; and the court held that the junior judgment creditors were entitled to a preference of payment out of the sale of the property taken in execution. *Berry v. Smith*,\* 8 Wash., 60.

§ 1761. If a judgment creditor who has levied upon the personal property of his debtor allows the goods to remain in the hands of the debtor for an unreasonable length of time, such execution will be postponed in favor of a subsequent execution levied upon the same goods. In such a case the goods may be sold under the second execution. In this case the goods had remained in the hands of the debtor for thirteen months. *United States v. Conyngnam*,\* Wall. C. C., 178.

§ 1762. The rule as to a purchaser claiming land with notice of a prior unrecorded conveyance does not apply to a creditor who levies an execution with knowledge of a prior void levy upon the same land by another creditor. *Kent v. Roberts*,\* 2 Story, 591.

§ 1763. **Validity.**—The levy of an execution by an officer to whom it is not directed is a nullity. *Ibid.*

§ 1764. **Time of return.**—A marshal is not bound to hold an execution till return day, but may return it sooner. *Bassett v. Orr*, 7 Biss., 296.

§ 1765. **Return showing no levy.**—The return on an execution that the proceedings thereon were stopped by order of the plaintiffs, in consequence of a compromise between the plaintiffs and the defendant, does not show that there was a levy, but rather indicates that there was no levy, since it is the duty of the officer to return positively the fact of a levy if there is one. *Scriba v. Deanes*,\* 1 Marsh., 166.

§ 1766. **On leasehold and fixtures.**—Where a sheriff levies upon a leasehold and machinery fixed thereto, he is not obliged to remove the machinery, but may leave it in its place until the sale. *Dawson v. Daniel*,\* 2 Flip., 310; 8 Cent. L. J., 185.

§ 1767. An officer levying an execution upon a leasehold and machinery thereon which is attached to the soil should levy on both together and sell both together. And this whether the leasehold be considered as realty or personalty. *Ibid.*

§ 1768. In making a levy upon a leasehold, even where it is taken as a chattel interest in real estate, the sheriff cannot oust the tenant in possession or the execution debtor without his consent, and he cannot be required to exercise any dominion or control over it founded on any idea of right to the possession. He should proclaim his levy to those in charge and notify the tenants of it, but it seems that even that is not necessary to maintain the levy. A mere paper levy is sufficient. *Ibid.*

§ 1769. Where a sheriff levies an execution upon a leasehold he has no right to put a watchman on the premises or remain there himself without the consent of the defendant, and his presence not being necessary to symbolize his title under the levy, the withdrawal of the watchman is no abandonment of the levy. *Ibid.*

§ 1770. **On stock of goods.**—A deputy-sheriff went to the store of a judgment debtor with an execution against him. He was unable to obtain an entrance, but by procuring a ladder he was able by its use to look through a window and see that there were goods in the store. He did not enter, but indorsed on the execution in pencil, "Jan'y 4, levied on stock and fixtures" in store in question. Held, that this constituted an actual levy on the goods. *MacDonald v. Moore*, 8 Ben., 579.

§ 1771. **Against corporations.**—The act of 1870, relating to executions against corporations, does not repeal any of the preliminaries before levy and sale required by section 73 of the act

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of 1836, but is in addition thereto; and a levy made without observing the preliminaries prescribed by section 72 will be set aside. *Fox v. Hempfield R. R. Co.*, 2 Abb., 151; S. C., 13 Int. Rev. Rec., 28; S. C., 8 Phil. (Pa.), 639.

§ 1772. **On property in hands of officer.**—When an execution comes into the hands of a sheriff while property belonging to the debtor is already in his possession under a former execution, it is not levied upon such property by mere operation of law without any act of the officer. *Scriba v. Deanes*,\* 1 Marsh., 166.

§ 1773. The receipt of a second execution after a levy under the first one, and while such levy remains in force, operates as a constructive levy under the second, and an actual levy under it is unnecessary. *In re Smith*, 2 Ben., 432.

§ 1774. **On land.**—In the levy of an execution upon land there should be that degree of certainty which would enable any one to know the land taken in execution. Short of this it does not give proper notice to a subsequent purchaser or one causing a subsequent levy to be made upon the land. Thus a levy upon a part of a lot, without describing what part, does not meet the requirement. *Gault v. Woodbridge*,\* 4 McL., 329.

§ 1775. **Miscellaneous.**—The value of goods levied on may be shown by parol evidence, as a means of arriving at the amount of damages which the plaintiff has sustained, where the return does not show the value. *Campbell v. Pope*, Hemp., 271.

§ 1776. A vague levy on land may be rendered certain by the appraisalment, in which it is particularly described. *Sumner v. Moore*, 2 McL., 59.

§ 1777. The sheriff's deed being certain cannot be avoided collaterally by a defect in the levy. *Ibid.*

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Abbreviations: *Ind.*, Indiana. *Inf.*, Informers. *Inn.*, Innkeepers. *Ins.*, Insanity. *Int.*, Interest and Usury. *Isl.*, Islands. *Judg.*, Judgments and Executions.

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Abbreviations: *Ind.*, Indians. *Inf.*, Informers. *Insk.*, Innkeepers. *Ins.*, Insanity. *Int.*, Interest and Usury. *Isl.*, Islands. *Judg.*, Judgments and Executions.

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